UNIVERSITY
OF CALIFORNIA
LOS ANGELES

SCHOOL OF LAW
LIBRARY

THE

LAW OF MORTGAGES

OF

REAL AND PERSONAL PROPERTY.

BY

FRANCIS HILLIARD,

AUTHOR OF "THE LAW OF TORTS," ETC. ETC.

"The case of mortgages is one of the most splendid instances in the history of our jurisprudence of the triumph of equitable principles over technical rules, and of the homage which those principles have received by their adoption in the Courts of Law." — CHANCELLOR KENT.

THIRD EDITION, REVISED AND GREATLY ENLARGED.

IN TWO VOLUMES.

VOL. I.

BOSTON:

LITTLE, BROWN AND COMPANY.

1864.

Entered according to Act of Congress, in the year 1864, by
FRANCIS HILLIARD,
in the Clerk's Office of the District Court of the District of Massachusetts.

T
H 5585 m
1864

RIVERSIDE, CAMBRIDGE:
PRINTED BY H. O. HOUGHTON AND COMPANY.

PREFACE TO THE FIRST EDITION.

THERE are few titles in the law, of higher importance in the United States, than that of *Mortgage*. With the increase and extension of population, intercourse, and trade, and the consequent enlarged connection of individuals in the relation of creditor and debtor, the cases in which real or personal estate is conditionally transferred, as security for debt, become indefinitely multiplied. The explanation of this fact is found in the consideration, that both creditor and debtor generally prefer a conditional to an absolute transfer; the former, because he seeks payment of his debt, not an acquisition of property; and the latter, because he may thus postpone a pressing claim, and at the same time avoid a sacrifice of his estate.

Not only has the transaction in question become a very *frequent* one, but the relations which it involves or induces are peculiarly *various and complicated;* leading to nice and difficult questions, which constantly require an appeal to legal tribunals for their settlement. An *absolute* transfer of property wholly divests the grantor of his title, and vests in the grantee the same simple and unqualified ownership. But a *mortgage* confers

7787786

upon the mortgagee a title, and at the same time leaves a title in the mortgagor. The relation between these two parties themselves is attended with many obscure incidents and fine distinctions; and when either party transfers his estate, and more especially when such alienation occurs on both sides, the state of the title is liable to become still more involved. Accordingly, it will be found that there is no subject, upon which new combinations of facts in reference to one or both of the parties more continually arise; calling for novel applications of old principles, or a judicial establishment of new rules, founded upon analogy, but never before distinctly propounded and settled. The title of *mortgage* is rapidly becoming one of the most copious and voluminous in the law.

It is the aim of the author, in the following work, to embody more or less at length all the English and American decisions upon the subject, together with the statutory provisions of the several States. The plan is such as to make the book equally applicable in all the States of the Union.

It is believed, that the present work is the first attempt to present a systematic view of the Law of *Mortgages of Personal Property*. Until a recent period, this form of mortgage has been infrequent, and given occasion to few questions and decisions. Without the security afforded by *registration*, which is a practice now very generally adopted in the United States, a conditional transfer of chattels, which allows the seller to remain in possession and use of the property, has undoubtedly been found to a great degree impracticable;

leading to the greatest confusion and uncertainty of title, to frauds upon creditors between the mortgagor and mortgagee, and also to frauds by the former upon the latter, where the mortgage itself was a fair and honest transaction. The recording system has afforded a remedy for these evils; and consequently the mortgage of personal property, from being a rare transaction, is becoming one of almost daily occurrence; and the conflicting rights of the parties, and more especially of third persons claiming under one or both of them, the construction of statutes, and the application of the principles pertaining to mortgages of real property, with such modifications as are demanded by the different nature of the subject-matter, — give rise to numerous and continually multiplying questions for judicial decision. A large space in the present work is occupied with this branch of the general subject.

The plan of the book is threefold: first, to arrange the heads or topics in natural and philosophical order, avoiding, as far as possible, the mixing up together of subjects which properly belong apart, or the separation of those which ought to be treated in connection; second, facility of reference to each and every part of the work, by means of this arrangement, and of a very copious index; and third, the incorporation of decided cases, including the facts and the opinions of judges, to such an extent as to supersede, in a great measure, the necessity of reference to the original reports themselves.

The author trusts, that the work may not be found wanting, in the all-important qualities of systematic arrangement and accuracy of citations and references; and that it may in some good degree supply the defect which has long existed in the library of every American lawyer.

Boston, December, 1852.

PREFACE TO THE THIRD EDITION.

To this edition the late cases have been copiously added; and incorporated, without any marks of distinction, into the body of the text and notes. Late statutes, with the possibility of omission necessarily arising from their great number and variety, have also been inserted or referred to.

Boston, 1864.

CONTENTS.

CHAPTER I.

PAGE

DEFINITION OF A MORTGAGE, ETC. 1–33

1. Definition of a mortgage. Mortgage for the purchase-money. Distinction between a mortgage and the *vivum vadium*, &c.
4. What may be mortgaged.
5. Parties to a mortgage: aliens; married women; infants; joint tenants, &c.
27. Early construction of the condition of a mortgage; performance, tender, &c.
36. Form of expressing the condition; stipulation for reconveyance, &c.
38. Mortgages for years; mortgage of leaseholds.
39. Jurisdiction of Courts of Equity over mortgages.
43. Equity of redemption.

CHAPTER II.

DEFEASANCES 34–48

1. Nature and history of defeasances.
5. Deed and defeasance must be concurrent; whether the date of both must be the same.
7. Language of a defeasance.
9. Form, and mode of execution, of a defeasance; whether a seal is necessary.
10. Defeasances in the United States.
11. Recording of defeasances.

CHAPTER III.

PAROL DEFEASANCES 49–66

Whether a mortgage can be created by parol agreement, or proved by parol evidence. Doctrines of law and equity upon the subject. Practice in the United States.

CHAPTER IV.

DOCTRINE OF EQUITY IN THE CONSTRUCTION OF THE CONDITION OF A MORTGAGE. RESTRICTION UPON THE RIGHT OF REDEMPTION, ETC. 67–94

1. The right of redemption cannot be restricted.
6. Though the condition is contained in a separate defeasance.

7. Or informally expressed.
8. Application of the rule to collateral or subsequent negotiations between the parties.
9. Not applicable in case of *family settlements*.
10. Exception in case of corporations.
11. Release of the equity of redemption, or cancelling of a defeasance; whether valid.
24. Contract to pay more than the mortgage debt and interest.
26. Subsequent agreement to limit the time of redemption.
28. The mortgagor has the benefit of any new acquisitions made by the mortgagee.
31. Case of *Flagg* v. *Mann*.
33. Conditional assignment of a mortgage.

CHAPTER V.

CONDITIONAL SALE, AS DISTINGUISHED FROM A MORTGAGE 95–107

CHAPTER VI.

PERSONAL LIABILITY OF THE MORTGAGOR, ETC. 108–127

1. Personal liability of the mortgagor; whether necessary to constitute a mortgage; whether the deed itself creates such liability, &c.
26. Mortgages for *support and maintenance*, &c.
28. *Covenant* or *condition* for payment of the debt, how construed. Covenants *for title* in a mortgage. Mutual relation and effect of the covenants in the deed and the mortgage. *Estoppel, Rebutter*, &c.

CHAPTER VII.

POWER OF SALE 128–149

CHAPTER VIII.

NATURE OF THE TITLE AND ESTATE OF THE MORTGAGOR 150–177

1. The mortgagor remains the real *owner*, till breach of condition, entry of the mortgagee, or foreclosure.
2. Remarks of judges and elementary writers upon this subject.
5. Qualifications of the general rule; how far the mortgagee may be called *owner*.
6. A mortgage is not an *alienation* of the land, or revocation of a devise.
15. Mortgagor may maintain a real action, as owner.
16. And gains a *settlement*, and other civil privileges.
17. His possession is not *adverse*.
18. The mortgagee, in general, has the right of immediate possession.
20. When he has not this right; agreement for the possession of the mortgagor, how proved; when implied; mortgages for support, &c.

CHAPTER IX.

NATURE OF THE MORTGAGOR'S INTEREST, WHILE LEFT IN POSSESSION 178–225

1. Whether the mortgagor is a *tenant, receiver, agent*, &c.
9. Remedies of the mortgagee for rent, and for obtaining possession. *Notice to quit*, whether necessary.

12. Doctrine in the United States.
18. Lease by the mortgagor; respective titles of mortgagee, mortgagor, and lessee; case of *Keech* v. *Hall*.
35. Distinction between leases made after, and before, the mortgage.
38. Joint lease by mortgagor and mortgagee; covenants in the lease of a mortgagor, whether assignable, &c.
45. General summary.
46. Liability of a mortgagee of leasehold upon the covenants; case of *Eaton* v. *Jacques*.

CHAPTER X.

WASTE BY THE MORTGAGOR OR MORTGAGEE, AND REMEDIES THEREFOR 226–234

1. The mortgagor cannot commit waste.
2. Remedy by injunction.
5. By action at law.
10. Injuries done by third persons.
11. Waste by the mortgagee.

CHAPTER XI.

ESTATE OF THE MORTGAGEE. NATURE OF HIS TITLE. CONNECTION BETWEEN THE MORTGAGE AND THE PERSONAL SECURITY 235–290

1. A mortgage is *personal estate*. The mortgagee has a mere *lien* or *pledge*. Transfer of mortgage without the debt.
3. Assignment of the debt; whether it passes the mortgage; doctrine upon this subject in the several States; mortgage to secure several debts, some of which are transferred; assignment of different debts to different persons.
20. The mortgagee cannot make a *lease*.
21. He has an *insurable* interest. Rights and duties of parties in case of the insurance of mortgaged property.
37. The assignment of a mortgage is the assignment of an *estate*, not a mere *security*.
38. Case of *Martin* v. *Mowlin*, and criticisms thereupon.
41. Joint mortgagees; their interest in the mortgage and the personal security.
46. A mortgage is not subject to legal process.
51. Passes as personal property, upon the death of the mortgagee.
58. By what words *devised*.
59. Respective titles of *heir* and *executor*; nature of the interest in the executor's hands; sale for payment of debts, &c.

CHAPTER XII.

ESTATE OF THE MORTGAGEE. WHAT CLAIMS AND DEMANDS SHALL BE SECURED BY THE MORTGAGE. TACKING. FUTURE ADVANCES . . . 291–327

1. Construction of the condition of a mortgage. Ambiguity of description. Variance between the mortgage and personal security, &c.
22. *Tacking*.
33. Whether adopted in the United States.
41. Future or subsequent advances.

CHAPTER XIII.

ESTATE OF THE MORTGAGEE. CONCURRENT OR SUCCESSIVE MORTGAGES OF THE SAME PROPERTY. RIGHTS OF PARTIES COLLATERALLY INTERESTED IN THE MORTGAGED ESTATE 328–373

1. Concurrent mortgages.
2. Land subject to mortgages may be further mortgaged. General rights of subsequent mortgagees; when they become entitled to priority, &c.
23. Equitable application of estates subject to successive mortgages.
30. Rights of parties collaterally liable for debts secured by mortgage; sureties; subsequent mortgagees.
41. Mortgages of indemnity to sureties, &c.
68. Transfer of different estates, subject to one mortgage. Equitable apportionment of the mortgage debt.

CHAPTER XIV.

FROM WHAT FUND A MORTGAGE SHALL BE PAID, UPON THE DEATH OF THE MORTGAGOR 374–388

1. General nature of the subject — general rules as to the fund for payment of a mortgage — decided cases — miscellaneous points and decisions.

CHAPTER XV.

EQUITY OF REDEMPTION 389–447

1. Definition and nature of an equity of redemption.
3. Distinction between an equity of redemption and a *trust*.
12. Who may redeem a mortgage.
21. Against whom redemption may be claimed.
24. Redemption in case of the death of the mortgagor.
27. Redemption by a party having a partial interest in the property; claim for reimbursement.
29. An equity of redemption is *assets*.
30. And liable to legal process.
33. But it is not thus liable, in a suit upon the mortgage debt; cases and distinctions upon this subject.
48. Whether the indorsee of a mortgage note may levy upon the equity of redemption.
51. *Curtesy* in an equity of redemption.
52. Whether subject to *dower*; English and American law upon this subject.
83. On what terms the widow may redeem.

CHAPTER XVI.

EQUITY OF REDEMPTION. TERMS OF REDEMPTION. ACCOUNT OF A MORTGAGEE IN POSSESSION. HIS LIABILITY FOR RENTS, AND CLAIM FOR EXPENDITURES 448–479

1. The mortgagee is liable to account, as a *steward* or *bailiff*; extent of his liability.
12. Mode of computing *interest*; whether the mortgagee is chargeable with interest; annual *rests*.

18. What provisions in a mortgage will bind the party to pay interest.
20. Interest, in case of a particular tenant and reversioner.
22. For what repairs and other expenditures the mortgagee shall be allowed.
34. Sale of a part of the mortgaged property; proceeds to be accounted for.
35. Accounting for rents, &c., to subsequent mortgagees, creditors, assignees, &c.
45. *Receivers.*
52. Parties in case of a decree to account for rents, &c.

CHAPTER XVII.

EXTINGUISHMENT OF A MORTGAGE, BY PAYMENT, RELEASE, ETC. 480–533

1. In general, payment of the debt pays the mortgage also.
2. Payment after breach of condition; *waiver* as to time. *Changing the security* for a debt does not extinguish the mortgage. New notes, &c.
8. Effect upon the mortgage of legal and judicial proceedings, either between the parties, or in connection with strangers.
10. Of making the mortgagor the executor, &c., of the mortgagee.
11. Whether *a deposit* shall be treated as payment.
12. Surrender of the note for a release of the right of redemption; whether payment.
13. Exceptions and qualifications to the rule above stated. Extinguishment of a mortgage without direct payment; by renewal of notes, appointment of executors, legal proceedings, &c.
20. *Application* or *appropriation* of payments; mutual claims and offsets.
23. Presumptions and circumstantial evidence as to payment. Parol evidence.
30. The effect of payment upon the titles of the respective parties and their remedies.
42. Extinguishment of a mortgage, by a transfer of the land to the mortgagee.
49. *Release* or *discharge* of a mortgage. Discharge upon the record.
58. When a release may be avoided.

CHAPTER XVIII.

ASSIGNMENT OF A MORTGAGE 534–584

1. What constitutes an *assignment*, and what a *discharge*, of a mortgage.
2, 11, 20. Interest and intention of the parties.
3. Party having *a right* to an assignment. Intervening liens, &c.
6. Warranty or quitclaim deed, whether an assignment.
12. Cases of *dower*.
13. Conveyance to a *trustee*.
14. Payment by mortgagor, after his equity is sold.
15. Cases of *suretyship*.
18. Conveyance of *part* of the land.
20. *Joint mortgagors*, — separation of joint interest.
21. In reference to parties who have *parted with nothing*.
22. Miscellaneous cases.
35. Mortgage of *indemnity;* when the law implies an assignment of such mortgage.
37. Conditional assignment of a mortgage, whether itself a mortgage.
42. Form of assignment.
46. What passes by an assignment; whether a mortgagee, after assignment, can release or bring an action.
55. Whether he shall be party to a suit for redemption or foreclosure.
57. Consideration paid by the assignee, whether material.
60. For what amount the mortgagor is liable to the assignee. Whether the latter is bound by previous payments, set offs, &c.

73. Guaranty by the mortgagee, whether implied from assignment.
74. Effect of the mortgagor's joining in the assignment.
80. Recording of an assignment. How far an assignee's title may be affected by fraud or notice.

CHAPTER XIX.

VOID AND VOIDABLE MORTGAGES. USURY . . 585–606

1. General principle as to avoiding deeds.
2. Usury.
4. What constitutes usury in a mortgage.
12. What does not constitute usury.
22. Statement of questions arising in relation to usurious mortgages.
25. When the sum legally due may be recovered.
26. Distinction between a bill for foreclosure, and a bill to redeem, in relation to usury.
33. What parties may be affected by usury in a mortgage.
36. What parties may avail themselves of such usury.
40. What will preclude a mortgagor from setting up usury; effect of a prior judgment, &c.
41. Form of pleading usury.
44. Evidence — parol evidence.

CHAPTER XX.

VOID AND VOIDABLE MORTGAGES. ILLEGALITY, WANT, OR FAILURE OF CONSIDERATION . . . 607–617

1. Illegal consideration.
5. Want of consideration; as between the parties, and in relation to creditors, &c.
12. Want or failure of consideration, consisting in *a defect of title*.

CHAPTER XXI.

VOID AND VOIDABLE MORTGAGES. FRAUD BETWEEN THE PARTIES AND IN RELATION TO CREDITORS. FRAUD ON THE PART OF A MORTGAGEE; EFFECT UPON SUBSEQUENT INCUMBRANCERS 618–646

1. Fraud between the parties.
6. Fraud as to creditors, &c.
16. Fraudulent concealment or misrepresentation of title by a mortgagee; effect upon subsequent incumbrancers; attestation by him of a subsequent deed; delivery of title-deeds to the mortgagor, &c.; *estopped*.
31. Limitations and restrictions of the rule above stated.
40. Mortgage from client to attorney.
41. Mortgage of an infant.
43. Mortgage in reference to bankrupt, &c., laws.

CHAPTER XXII.

EQUITABLE MORTGAGE. DEPOSIT OF TITLE-DEEDS 647–659

1. Equitable liens.
2. Deposit of deeds; constitutes a mortgage; establishment of the doctrine; case of *Russel* v. *Russel*.
3. Qualifications and criticisms of the rule; remarks of judges and elementary writers.

4. Decisions, establishing the doctrine.
5. General rules and principles.
12. American doctrine.
17. Effect upon the title of a mortgagee, of leaving the deeds in the hands of the mortgagor, and a deposit by him.

CHAPTER XXIII.

EQUITABLE MORTGAGES. LIEN OF A VENDOR FOR THE PURCHASE-MONEY 660–714

1. General nature of the lien.
3. Remarks upon the policy of the rule; whether it is consistent with the general doctrines relating to real property.
7. The doctrine is well settled by the weight of authorities.
8. Strictures and criticisms of the American courts. The rule is not adopted in some of the States.
9. But it is adopted in most of them; abstract of decisions upon the subject.
10. General nature of the lien; an *equitable* right.
20. Against what parties the lien may be enforced. Purchasers; by what notice they shall be affected.
27. Heirs.
28. Widow — husband and wife.
30. Creditors.
33. By whom the lien may be enforced.
37. Waiver and discharge of the lien of a vendor for the purchase-money, by taking security therefor, or by other acts and agreements.
53. Mode of enforcing the vendor's lien; bill, decree, &c.

CHAPTER XXIV.

REGISTRATION OF MORTGAGES 715–729

General requisition of registration in the United States; not necessary *between the parties*, &c.; operation of an unrecorded mortgage, as against other incumbrances; registration, how far notice; not necessary, as against parties having notice; what shall constitute such notice; form of registration, &c.

INDEX TO CASES CITED.

A.

PAGE

Abbe *v.* Goodwin 482
v. Newton 610
Abbott *v.* Godfrey 660
v. Upham 177
v. Upton 496
Aborn *v.* Burnett 62
Ackla *v.* Ackla 509, 512, 631
Adair *v.* Adair 569
Adams *v.* Barnes 604
v. Brown 451, 468
v. Hill 3
v. McKenzie 85
Addison *v.* Crow 329
Ætna, &c. *v.* Tyler 712
Aikin *v.* Gale 359
v. Morris 620
v. Skilburn 271
Albany, &c. *v.* Bay 138, 160
Albany's case 36
Alderson *v.* Ames 3, 7
v. White 4
Aldridge *v.* Dunn 691, 700
v. Weems 562
v. Westbrook 543
Aldworth *v.* Robinson 298
Alexander *v.* Heriot 663
Alford *v.* Helms 684, 709
Allen *v.* Bicknell 167
v. Clark 360, 364
v. Hudson, &c. 260
v. Montgomery, &c. 719
v. Parker 167
Allenby *v.* Dalton 109
Ammerman *v.* Jennings 687
Amory *v.* Reilly 663, 687, 710
Ancaster *v.* Mayer 109, 380
Anderson *v.* Baughman 726
v. Baumgartner 251, 629
v. Davies 293
v. Neff 480
Andrew Newport's case 722
Andrews *v.* Burns 716

PAGE

Andrews *v.* Wolcott 126, 363
Angier *v.* Masterson 5
Anthony *v.* Rogers 448
v. Smith 701
Applegate *v.* Mason 491
Appleton *v.* Boyd 276
Armitage *v.* Wickliffe 483
Arnold *v.* Foot 468
v. Mattison 66, 622
Arnot *v.* Post 21
Asay *v.* Hoover 286, 390
Ash *v.* Ash 716
Ashe *v.* Livingston 716
Ashhurst *v.* The Montour, &c. 1
Ashton *v.* Dalton 654, 655
Aston *v.* Aston 459
Astor *v.* Hoyt 221, 483
v. Miller 483
v. Turner 475
Atkins *v.* Sawyer 498
Atkinson *v.* Maling 317
Atterbury *v.* Willis 630, 638, 645, 657
Attorney-General *v.* Bowyer 286
v. Phillips 285
v. Scott 422
v. Winstanley 153
Atwood *v.* Vincent 667, 672
Augur *v.* Winslow 481
Austen *v.* Halsey 673
Austin *v.* Austin 121
v. Bradley 85
v. Downer 351
Averill *v.* Guthrie 630
v. Loucks 17
v. Taylor 397, 403
Aymar *v.* Bill 239
Ayres *v.* Case 503
v. Husted 341, 342

B.

Babbitt *v.* Bowen 281
Babcock *v.* Kennedy 199

PAGE

Babcock *v.* Morse 344, 482
Bacon *v.* Bowdoin 194, 396
v. Brown 64, 99, 109
Badham *v.* Cox 693
Bagot *v.* Oughton 345
Bailey *v.* Gould 237
v. Lincoln, &c. 607
v. Murphy 589
v. Richardson 545
v. Warners 344
Baine *v.* Williams 341
Baker *v.* Pierson 298
v. Thrasher 97
v. Winipee 513
Baldwin *v.* Jenkins 24, 39, 413
v. Norton 494, 602
Ballard *v.* Carter 284
Ballinger *v.* Edwards 593, 594
Bank *v.* Herbert 716
v. Mitchell 342
v. Willard 320
Bank, &c. *v.* Carpenter 609, 716
v. Christie 326
v. Finch 308, 318, 483
v. Flagg 721
v. Mott 232
v. Peter 339
v. Rose 451, 484
v. Sprigg 49
v. Tarleton 253, 495
v. Whyte 66, 295, 394
Banks *v.* Sutton 421
v. Walker 614
v. Waller 617
Banta *v.* Garmo 544
Barber *v.* Cary 337
Bard *v.* Fort 604
Barden's case 180
Barelli *v.* Schymanski 194, 390
Barham *v.* Earl, &c. 560
v. Thanet 387
Baring *v.* Moore 364
Barkhamstead *v.* Farmington 164
Barnard *v.* Eaton 4, 16, 157, 419
v. Pope 626
Barnes *v.* Camack 530
v. Lee 562
v. Morris 344
v. Racster 343
Barney *v.* Adams 214
Barnitz *v.* Smith 693
Barr *v.* Kinard 73, 78, 721
Barraque *v.* Maunel 565
Barroilhet *v.* Battelle 28, 235
Bartholomew *v.* M'Kinstry 620
Bassett *v.* Bassett 44

PAGE

Bates *v.* Ruddick 359
Battles *v.* York, &c. 259
Batty *v.* Snook 73, 78, 86
Baxter *v.* McIntire 291, 292, 482, 484, 586
v. Willey 63
Bayler *v.* Commonwealth 11, 316
Bayley *v.* Bailey 38, 100
v. Greenleaf 619, 628, 640, 678, 691, 692
Baylies *v.* Bussey 527
Beall *v.* Barclay 359, 633, 643
Beals *v.* Clark 9
Beamish *v.* Overseers, &c. 165
Bean *v.* Mayo 171
Beare *v.* Prior 449
Beatie *v.* Butler 141, 142, 143, 286
Beatty *v.* Clement 584
Beck *v.* M'Gillis 286
Beckett *v.* Cordley 632
v. Snow 317
Beekley *v.* Munson 24
Beekman *v.* Frost 316
Beeley *v.* Wallace 192
Beers *v.* Hawley 717
Bein *v.* Heath 11, 143
Beirne *v.* Campbell 686
Belding *v.* Manly 247
Bell *v.* Fleming 316
v. Hammond 390
v. Mayor, &c. 451, 461
v. Morse 244
v. Thomas 719
v. Woodward 511, 541, 545
Benbow *v.* Townsend 52
Bend *v.* Susquehannah, &c. 66
Benham *v.* Rome 131, 141, 142, 449, 450
Bennett *v.* Butterworth 450
v. Holt 101
v. Solomon 568
v. Taylor 236
v. Union, &c. 24, 40, 129
Bennock *v.* Whipple 41
Bentham *v.* Haincourt 459
Bentley *v.* Phelps 65
Benzein *v.* Lenoir 392
Bergen *v.* Bennett 143, 148
Berger *v.* Hiester 504
Berney *v.* Sewell 477
Berry *v.* Mutual, &c. 657
Berrysford *v.* Millward 630
Besley *v.* Lawrence 357
Best *v.* Carter 24
v. Schermier 475
Bethlehem *v.* Annis 97, 106, 119, 169

	PAGE
Betton *v.* Williams	704
Bevant *v.* Pope	23
Bibb *v.* Williams	729
Bickford *v.* Daniels	61
Bigelow *v.* Topliff	63
Billinghurst *v.* Walker	384
Birch *v.* Wright	178, 183
Bird *v.* Gardner	431
Birnel *v.* Eskie	484
Bishop *v.* Warner	610
Bisland *v.* Hewitt	688, 689
Black *v.* Morse	368
Blackburn *v.* Gregson	673
v. Pennington	714
v. Warwick	456
Blackwell *v.* Overby	61, 62
Blair *v.* Bass	62, 251
v. Ward	369
Blair's case	288
Blake *v.* Williams	245, 332, 620
Blakemore *v.* Byrnside	66, 107
Blanchard *v.* Colburn	278
v. Kenton	21
Blaney *v.* Bearce	177
Blodgett *v.* Wadhams	481
Bloodgood *v.* Zeily	74
Bloom *v.* Noggle	2, 647
Bloomer *v.* Henderson	574
v. Van Rensselaer	129, 390
Blount *v.* Hipkins	387
Blydenburgh *v.* Cotheal	590
Blyer *v.* Monholland	363
Boarman *v.* Catlett	395
Bobbitt *v.* Flowers	487
Boden's estate	283
Bodwell *v.* Webster	37, 41, 55
Boisgerard *v.* Wall	18
Bolles *v.* Chauncey	481, 484, 719
v. Wade	556
Bollinger *v.* Chouteau	461
Bolton *v.* Ballard	421, 432
v. Brewster	516
Bond *v.* Kent	672
Bonham *v.* Galloway	497
v. Newcomb	75, 76
Bonithon *v.* Hockmore	450
Boody *v.* Davis	44, 61
Booker *v.* Gregory	455
Boon *v.* Barnes	682
Boos *v.* Ewing	700
Booth *v.* Barnum	317
v. Sweezey	361
Boqut *v.* Coburn	68, 402
Borst *v.* Boyd	390
Boston, &c. *v.* King	234, 456, 504
Bottomly *v.* Fairfax	422
Bottorf *v.* Conner	677
Bourne *v.* Littlefield	458
Bowditch, &c. *v.* Winslow	259, 260
Bowen *v.* Edwards	70
Bower *v.* Crane	192
Bowes *v.* Seager	580
Bowker *v.* Bull	344
Bowman *v.* Manter	497
Boyd *v.* Stone	55
Boylston *v.* Carver	287
Bozon *v.* Williams	655
Brace *v.* Duchess, &c.	298
Bradford *v.* Harper	687, 701
v. Marvin	695
v. Potts	617
Bradley *v.* Chester, &c.	130
v. Snyder	466
Bragg *v.* New England, &c.	161, 260, 268
Brainerd *v.* Brainerd	64
v. Cooper	396
Braman *v.* Wilkinson	721
Branch, &c. *v.* Fry	203
Bratton, &c.	415, 729
Brawley *v.* Catron	679
Breckenridge *v.* Auld	35
v. Brooks	450
v. Ormsby	518
Brewer *v.* Staples	349
Brick *v.* Getsinger	227
Bridenbecker *v.* Lowell	247
Briggs *v.* Davis	390
v. French	619
v. Hill	703
v. Sholes	593, 603, 605
Brinkerhoff *v.* Lansing	486, 633
v. Vansciner	671, 674
Brisbane *v.* Stoughton	129
Briscoe *v.* Bronaugh	678, 684
v. King	122
Bristoe *v.* Knipe	122
Bristol *v.* Hungerford	298
Britton *v.* Updike	360
Brizick *v.* Manners	654
Brock *v.* Lewis	448, 607
Broderick *v.* Smith	86, 87, 168
Brolasky *v.* Miller	599
Brolley *v.* Lapham	514
Brooke *v.* Warwick	388
Brookover *v.* Hurst	621
Brooks *v.* Avery	590, 601
v. Harwood	443, 510
Broome *v.* Beers	627
Brown *v.* Barkham	87
v. Blydenburgh	563
v. Cole	482

PAGE

Brown *v.* Cram 157, 158, 182
v. Dewey 59
v. East 713
v. Glines 11
v. Kirkman 716, 728
v. Lapham 439, 543, 544
v. Leach 167, 172
v. Markham 87
v. Nickle 39
v. People's, &c. 258
v. Sewell 481
v Snell 163
v. Staples 126
v. Stewart 167, 227
v. Story 205
v. Worcester, &c. 403
v. Wright 65, 308
Brumfield *v.* Palmer 687
Brundige *v.* Poor 11
Brush *v.* Kinsley 705
Bryan *v.* Butts 151, 153, 236
v. Cowart 36, 37, 66
Bryant *v.* Crosby 56
v. Damon 242
Buchanan *v.* Munroe 390
Buck *v.* Sherman 413
Budd *v.* Bush 671
Budeley *v* Massey 27
Buell *v.* Tate 123
Buffum *v.* Bowditch, &c. 259
Bulkley *v.* Chapman 248
Bullard *v.* Bowers 444
v. Leach 541
Bumgardner *v.* Allen 117
Bumpas *v.* Dotson 296
v. Plattner 613
Burchard *v.* Phillips 329
Burdett *v.* Clay 252, 483
Burgess *v.* Sturgis 709
v. Wheat 389, 672, 712
Burlingame *v.* Robbins 683
Burnet *v.* Deniston 141, 143
v. Dennison 311
v. Pratt 276, 277
Burns *v.* Hobbs 620
v. Taylor 661, 674, 687
Burton *v.* Baxter 251
v. Pressly 482
v. Slattery 87
Bush *v.* Cooper 585
v. Livingston 588
Bushell *v.* Bushell 718
Bussey *v.* Page 231
Buswell *v.* Davis 633
Butler *v.* Butler 384
v. Elliott 341

PAGE

Butler *v.* Paige 180
v. Taylor 341
Butt *v.* Boudurant 596
Byars *v.* Bancroft 629
Byass *v.* Bancroft 331, 482
Byers *v.* Fowler 291, 360, 495

C.

Cadwallader *v.* Mason 155
Cahoon *v.* Robinson 688
Cake's, &c. 3, 331, 664
Calkins *v.* Calkins 236
v. Munsell 373
Callum *v.* Branch, &c. 343
Cameron *v.* Irwin 83, 143, 182, 481
v. Mason 669
Campbell *v.* Baldwin 685, 697, 700
v. Knights 535
v. Low 12
v. Macomb 228
v. Worthington 63
Capen *v.* Richardson 36
Carew *v.* Johnston 477, 573
Carey *v.* Rawson 40
Carpenter *v.* Cummings 639
v. Providence, &c. 256, 263, 269
Carr *v.* Caldwell 3, 447
v. Hobbs 671, 688
Carter *v.* Bennett 254
v. Carter 60, 66
v. Dennison 596
v. New York, &c. 257, 258
v. Rockett 258
Carvis *v.* M'Clary 204
Cary *v.* Prentiss 489
Casborne *v.* Inglish 23
v. Scarfe 154, 159
Casey *v.* Buttolph 548
Cass *v.* Martin 439
Castleman *v.* Belt 198, 208
Cathcart's, &c. 336
Catherine *v.* Meyrick 280
Cator *v.* Charlton 305
Cavis *v.* M'Clary 200
Center *v.* P. & M. Bank 254, 721
Chace *v.* Palmer 155
Chadbourne *v.* Rackliff 553
Chamberlain *v.* Barnes 573
v. Thompson 158, 312
Chambers *v.* Goldwin 86, 573
v. Hise 85
v. Mauldin 301
Champney *v.* Coope 480, 535, 538

	PAGE
Champlin *v.* Williams	359
Chance *v.* M'Whorter	682
Chancey *v.* Arnold	656
Chapman *v.* Armistead	192
v. Beecham	188
v. Chapman	648
v. Hughes	66
v. Mull	391
v. Smith	453
v. Stockwell	685
v. Tanner	472, 672
v. Turner	1, 29, 31, 100, 102
Charles *v.* Clagett	23, 390
v. Dunbar	333, 472
Charter *v.* Stevens	144
Chase *v.* M'Donald	313
Cheek *v.* Waldrum	128
Cheever *v.* Fair	360, 361
Chellis *v.* Stearns	168, 170
Cherry *v.* Bowen	67
v. Monro	340
Cheslyn *v.* Dalby	645
Chester *v.* Greer	641, 642
v. Wheelwright	297, 507
Chew *v.* Barnett	8, 661
Childs *v.* Childs	131, 150
Chilton *v.* Chapman	355
Chinnery *v.* Blackburne	223
Christophers *v.* Sparke	151
Choteau *v.* Thompson	482, 726
Cholmondeley *v.* Clinton	154, 178, 185, 448
Chowning *v.* Cox	25, 390
Church *v.* Savage	376
Churchill *v.* Cole	602
Cicotte *v.* Gagnier	574
Cilley *v.* Huse	474
Clabaugh *v.* Byerly	632, 635, 640, 642, 649, 718
Clagett *v.* Salmon	527
Claiborne *v.* Crockett	703
Clarendon *v.* Barham	388
Clark *v.* Beach	248, 249
v. Bell	708
v. Curtis	155, 475
v. Flint	573
v. Henry	93
v. Hobbs	61
v. Jenkins	581
v. Ridgley	475
v. Robbins	450
v. Smith	240, 462, 464, 468, 469
Clarke *v.* Sibley	391, 395
v. Stanley	338
Clason *v.* Shepherd	725
Clay *v.* Willis	131
v. Wren	171
Clearwater *v.* Rose	251
Clench *v.* Witherly	131
Cleveland *v.* Martin	482, 700, 702
Clift *v.* White	522
Clinton *v.* Hooper	13
Clough *v.* Elliott	437
Clower *v.* Rawlings	697, 698, 699
Clowes *v.* Dickenson	360
Coates *v.* Cheever	544
v. Woodworth	66
Coe *v.* Columbia, &c.	7
Coffing *v.* Taylor	129, 160, 166
Coker *v.* Pearsall	200
Colcord *v.* Seamonds	655, 707
Cole *v.* Boland	60, 644
v. Lovenskiold	609
Coleman *v.* Bank, &c.	729
Coles *v.* Coles	427
v. Perry	24, 100
Collamer *v.* Langdon	495, 539, 543
Collett *v.* Munden	305
Collier *v.* Harkness	683
Collins *v.* Carlile	287
v. Hopkins	143
Colman *v.* Packard	169
Colquhitt *v.* Thomas	628
Colquitt *v.* Thomas	678
Colton *v.* Smith	18
Columbia *v.* Lawrence	257
Colyer *v.* Finch	657
Commercial, &c. *v.* Cunningham	317
Comstock *v.* Stewart	25
Conant *v.* Warren	131
Conard *v.* Atlantic, &c.	317
Congdon *v.* Sanford	182
Conklin *v.* Bowman	617
Conover *v.* Mutual, &c.	160, 266
v. Warren	671
Contributors *v.* Gibson	482
Converse *v.* Cook	271, 559
Conway *v.* Alexander	100, 101, 112
v. Deerfield	164, 165
v. Shrimpton	5
Cook *v.* Colyer	605, 618
v. Gudger	61
v. Harris	222
v. Hinsdale	566
Cooley *v.* Hobart	609
Cooley's, &c.	537
Coombs *v.* Jordan	313
v. Warren	165
Cooper *v.* Davis	230
v. Ulmann	252

	PAGE
Cooper *v.* Whitney	26
Cope *v.* Romeyn	463
Copeland *r.* Copeland	719
Copis *r.* Middleton	343, 348
Coppin *v.* Coppin	672
Coppring *v.* Cooke	472
Corder *v.* Morgan	137
Corliss *v.* M'Lagin	463
Cornell *v.* Prescott	434
v. Pierson	35
Corning *v.* Murray	718
Coster *v.* Bank, &c.	705, 715
v. Monroe, &c.	125
Cotten *v.* Blocker	279, 647
Cottes *v.* Jeffers	484
Cotterell *v.* Long	24
v. Purchase	34, 35, 81
Cottington *v.* Fletcher	54
Cottman *v.* Martin	671
Couch *v.* Stevens	503
Couger *v.* Lancaster	117
Courtney *v.* Scott	74
v. Taylor	110
Coutant *v.* Servoss	148
Cowan *v.* Green	729
Cowles *v.* Raguet	607
Craft *v.* Bullard	66
v. Webster	581
Crafts *v.* Aspinwall	688, 710
v. Crafts	293, 402, 461, 466, 545
Craig *v.* Tappin	316
Crane *v.* Bonnell	101
v. Caldwell	696
v. Dewing	322
v. March	417
v. Palmer	689
Crawford *v.* Boyer	330
Crews *v.* Pendleton	182
Crinion *v.* Nelson	565
Crocker *v.* Robertson	125, 129
v. Thompson	511
Cronin *v.* Hazletine	332
Crooker *v.* Temell	284, 540
Crosby *v.* Brownson	248
Cross *v.* Hepner	23, 24
v. Robinson	515
Crow *v.* Vance	236, 252
Cullum *v.* Branch, &c.	486
v. Emanuel	524
v Erwin	333
Culp *v.* Fisher	124
Cumming *v.* Cumming	360
v. Williamson	275
Cunningham *v.* Davis	596
Curling *v.* Shuttleworth	131
Curtis *v.* Lyman	725
v. Root	4
Curtiss *v.* Tripp	627
Cushing *v.* Ayer	360, 363
r. Thompson	257
Cutler *v.* Haven	243
v. Lincoln	10, 515, 543
v. Pope	663
Cutts *v.* York	559, 565

D.

Dale *v.* Shirley	333
Danforth *v.* Smith	442
Darling *v.* Chapman	21, 168
Davenport *v.* Bartlett	41, 155
Davidson *v.* Beard	729
Davis *v.* Anderson	155
v. Battine	490
v. Clay	660
v. Cox	700
v. Fargo	506
v. Jewett	86
v. Lagarter	449
r. Maynard	483, 489
v. Mills	350
v. Rider	361
v. Stonestreet	100
v. Thomas	104
Davison *v.* De Freest	613
Day *v.* Clark	720
Deakyne *v.* Love	3
Dean *v.* Dean	672
r. De Legardi	719
Dearborn *v.* Dearborn	174
Dearing *v.* Lightfoot	720
v. Watkins	720
Deaver *v.* Parker	410
De Bolle *v.* Pennsylvania, &c.	255
De Butts *v.* Bacon	589
De Cottes *v.* Jeffers	351
Deforest *v.* Hough	492
Deibler *v.* Barwick	705
Delahay *v.* M'Connell	66
Delassus *v.* Poston	688, 689, 710
Demarest *v.* Winkoop	11
Deming *v.* Comings	508, 509, 584
Den *v.* Dimon	162, 240, 566
v. Spinning	512
Denton *v.* Nanny	427, 429
Destreham *v.* Scudder	131
De Vendal *v.* Malone	495, 612, 724
Dewey *v.* Bulkley	621
v. Latson	159
v. Van Deusen	283

	PAGE
Dexter *v.* Arnold	280, 449, 461
v. Phillips	192
Dey *v.* Dunham	34, 47
Dick *v.* Balch	719
v. Maury	253
Dillon *v.* Byrne	3, 690
Dingman *v.* Randall	499
Dinn *v.* Grant	714
Divoll *v.* Atwood	593, 605
Dixfield *v.* Newton	539
Dixie *v.* Davis	188
Dixon *v.* Cuyler	608
v. Dixon	705
Dobson *v.* Land	469
v. Racey	129, 142
Dockray *v.* Noble	246
Dodge *v.* Potter	725
Doe *v.* Barton	180, 209
v. Bank, &c.	728
v. Bucknell	197, 205
v. Cadwallader	206
v. Clifton	209
v. Cox	188
v. Day	175, 176, 190
v. Giles	180, 185, 190
v. Goldsmith	214
v. Goldwin	175
v. Goodier	206, 207
v. Hales	204
v. Kensington	204
v. Lawrence	216
v. Lewis	204
v. Lightfoot	176
v. Maisey	184
v. McLoskey	162
v. Olley	189, 206
v. Simpson	200
v. Stone	209
v. Tom	189
v. Warburton	201
v. Williams	*180
Doniphan *v.* Panton	608
Donnels *v.* Edwards	277
Dorkrey *v.* Noble	539
Dorr *v.* Peters	117
Doton *v.* Russell	515
Doub *v.* Barnes	599
Dougherty *v.* McColgan	80, 100, 236, 461, 463, 464
v. Randall	238
Douglas *v.* Shumway	663
Douglass *v.* Peele	717
Downer *v.* Button	245
v. Fox	340
v. Wilson	480, 538, 541
Doyle *v.* Stevens	720
Doyle *v.* White	296
Drew *v.* Rust	537, 541
Driver *v.* Clark	708
v. Hudspeth	708
Drury *v.* Morse	593
v. Dubois, &c.	250
Dryden *v.* Frost	723
Dudley *v.* Cadwell	127, 237, 248
Duncan *v.* Drury	535, 549
Dunham *v.* Dey	719
Dunshee *v.* Parmelee	455, 484
Durham *v.* Alden	626, 627
Dust *v.* Conrod	29
Dutton *v.* Ives	3, 363, 545, 581
v. N. E., &c.	160
Duvall *v.* Bibb	683, 697
Dwinel *v.* Perley	246
v. Pomeroy	50
Dyer *v.* Lincoln	605
v. Morton	685
Dyson *v.* Morris	271

E.

Eagle *v.* Pell	470
Earl of Belvedere *v.* Rochford	382
Earp, &c.	459
Eastman *v.* Batchelder	174
v. Foster	353
Eaton *v.* Green	101, 105
v. George	61, 582
v. Jaques	220, 221
v. Nason	12
v. Simonds	434, 441, 450, 535
v. Whiting	139, 279
Eckford *v.* De Kay	59
Eddleston *v.* Collins	11
Edmonds *v.* Crenshaw	317
Edmunds *v.* Povey	300
Edrington *v.* Harper	100
Edwards *v.* Bodine	615
v. Ferguson	116
v. Ins. Co.	21
v. Jones	215
v. Varick	237
Elder *v.* Rouse	114
Elfe *v.* Cole	1, 151
Ellicott *v.* United States, &c.	475
Elliot *v.* Edwards	673
Elliott *v.* Maxwell	61
v. Patton	396, 401
Ellis *v.* Guavas	286
v. Higgins	56
v. Martin	351
v. Messervie	645

	PAGE
Ellison *v.* Daniels	162, 244
Ellsworth *v.* Mitchell	334, 604
Elwys *v.* Thompson	403
Ely *v.* Schofield	281, 529, 581
Emerson *v.* Thompson	192
Emery *v.* Owings	294
Endsworth *v.* Griffith	80
Engle *v.* Haines	363
English *v.* Lane	40, 66
v. Russell	671
Enston *v.* Friday	485
Erskine *v.* Townsend	5, 37, 38
Erving *v.* Beauchamp	708
Eskridge *v.* McClure	683, 686, 688, 699, 703, 709
Estes *v.* Cook	192
Evans *v.* Elliot	196, 204, 207
v. Kimball	541
v. Merriken	4, 180, 274
v. Meylert	11
v. Thomas	233
Evertson *v.* Booth	341, 567
v. Ogden	368, 527
v. Sutton	150
Ewer *v.* Hobbs	155
Ewing *v.* Beauchamp	682
Exton *v.* Greaves	88, 110
Eyler *v.* Crabbs	677

F.

Fannell *v.* Murphy	397
Fanning *v.* Kerr	129
Farmer *v.* Simpson	666, 675, 702
Farmers, &c. *v.* Curtis	609
v. Douglass	582
v. Edwards	77, 516
v. Maltby	727
v. Mutual, &c.	487
Farquhar *v.* Morris	458
Farrant *v.* Lovel	233
v. Thompson	228
Farrar *v.* Winterton	661
Farrow *v.* Rees	638
Farwell *v.* Murphy	332
Faure *v.* Winans	469
Fawell *v.* Heelis	672, 673, 692
Fay *v.* Brewer	157
Felch *v.* Taylor	157, 238
Felton *v.* Brooks	270, 564
Fenner *v.* Tucker	141
Fenno *v.* Sayre	713
Fenwick *v.* Ratcliffe	596
Ferguson *v.* Ferguson	174
v. Kimball	119
Ferris *v.* Ferris	87
Fetter *v.* Cirode	296
Field *v.* Swan	203, 213
Field's, &c.	284
Fifield *v.* Sperry	281
Finch *v.* Brown	456
v. Winchelsea	713
Fink *v.* Martin	612
Fire, &c. *v.* Morrison	255
Firemen's, &c. *v.* Bay	11
Fish *v.* Howland	672, 680
Fisher *v.* Johnson	688, 689, 695, 702
v. Otis	574
Fiske *v.* Fiske	120
Fitch *v.* Cotheal	11, 545
Fitchburg, &c. *v.* Melven	194, 210
Fitzgerald *v.* Beebe	298
Fitzpatrick *v.* Fitzpatrick	142
Fitzsimmons, &c.	406
Flagg *v.* Flagg	170
v. Mann	61, 93, 112
Flanders *v.* Barstow	483, 487
v. Lamphear	172
Fleet *v.* Youngs	236
Fleming *v.* Burgin	720, 729
v. Parry	512
Flint *v.* Sheldon	55, 115, 605
Floyd *v.* Harrison	42
Floyer *v.* Lavington	103, 109
Fluck *v.* Replogle	549
Foley *v.* Howard	716
Follett *v.* Reese	697, 699
Folsom *v.* Belknap	160
Fontaine *v.* Beers	162
Forbush *v.* Goodwin	167
Ford *v.* Russell	130
Fordiff *v.* Schrugham	693
Foreman *v.* Hardwick	710
Forster *v.* Gillam	612
Fort *v.* Burch	720, 722
Fosdick *v.* Barr	716
Foster *v.* Briggs	635
v. Equitable, &c.	256, 258, 263
v. Trustees, &c.	695
Fowler *v.* Rice	41
v. Rust	701
Fox *v.* Clark	623
v. Lipe	280, 591
Frail *v.* Ellis	675, 684
Fraley *v.* Steinmetz	504
Francis *v.* Porter	351
Frankland *v.* Moulton	229
Franklin *v.* Gorham	235
Frazee *v.* Inslee	83
Frazer *v.* Jones	718

	PAGE
Freeby *v.* Tupper	417
Freeman *v.* Baldwin	37
v. Edwards	188
v. McGaw	542
Frelinghuysen *v.* Colden	328
French *v.* Fuller	192
v. Kennedy	295
v. Lyon	101
v. Sturdivant	42
Friedly *v.* Hamilton	45
Friesmuth *v.* Agawam, &c.	259
Frizzle *v.* Dearth	174
Frost *v.* Beekman	725
Frothingham *v.* McCusick	228, 229
v. Shephard	17
Frye *v.* Bank, &c.	495
Fuller *v.* Bennett	723
v. Hodgdon	90
v. Pratt	41
v. Wadsworth	192
Furbush *v.* Goodwin	168, 245, 481, 517, 539, 562, 571

G.

Gage *v.* Ward	436
Gahee *v.* Sneed	671
Gaither *v.* Teague	100
Gale *v.* Mensing	520
Galt *v.* Jackson	100
Gambril *v.* Doe	158
v. Rose	590
Gann *v.* Chester	692
Garber *v.* Henry	325
Garden *v.* Ingam	270
Gardner *v.* Astor	536
v. Finley	8
v. Gerrish	127
v. Heartt	233
Garroch *v.* Sherman	237, 240
Garwood *v.* Eldridge	331, 544
Gates *v.* Adams	371, 525
Gault *v.* M'Grath	486
Gay *v.* Minot	287
General *v.* Hardy	120
General, &c. *v.* U. S., &c.	608, 715, 718
Gentry *v.* Gentry	84
George *v.* Baker	275, 281
George's, &c. *v.* Detwold	170
Gerrish *v.* Mason	11, 519
Ghiselin *v.* Fergus	695
Gibson *v.* Bailey	288, 289
v. Crehore	376, 438, 441, 444, 454, 456, 545
Gibson *v.* Eller	26
v. Farley	315
v. Ingo	644
v. M'Cormick	378
v. Taylor	173
Gilbert *v.* Averill	375
v. Dyneley	451
v. Maggard	13
Gilkeson *v.* Snyder	663
Gill *v.* Lyon	366
v. M'Attee	668, 707, 720
v. Pinney	296, 724
Gilleland *v.* Failing	611
Gillett *v.* Balcom	181
v. Campbell	241, 563
v. Eaton	515
v. Powell	483
Gillis *v.* Martin	40
Gilman *v.* Brown	675
Gilson *v.* Gilson	122
Givan *v.* Tout	251
Given *v.* Doe	271
v. Marr	537
Givens *v.* M'Calmont	465
Glass *v.* Ellison	277
v. Warwick	11
Glasscock *v.* Glasscock	695
v. Robinson	706
Glenn *v.* Whipple	125
Glidden *v.* Hunt	560, 573
Gliddon *v.* Andrews	372
Glisson *v.* Hill	61
Glover *v.* Payn	99
Godeffroy *v.* Caldwell	573
Godfrey *v.* Rogers	86
v. Watson	468
Goldsmith *v.* Brown	291
Gooch *v.* Gooch	14
Goodburn *v.* Stevens	376
Goodell's case	6
Goodloe *v.* Clay	355
Goodman *v.* Grierson	99, 111
v. Kine	232
Goodtitle *v.* Morgan	209, 658
Goodwin *v.* Richardson	238, 276
Gordon *v.* Graham	321
v. Hobart	233, 593, 601
v. Lewis	449, 450, 454, 461, 471, 474, 479
Gore *v.* Jenness	231, 233
Goring *v.* Shreve	407
Gorson *v.* Blakey	119
Gossin *v.* Brown	345
Gothard *v.* Flynn	656
Gould *v.* Newman	271
v. Tancred	29

PAGE

Gouldsworth *v.* Knights 209
Grace *v.* Mercer 626, 629
Graggs *v.* Bailey 704
Graham *v.* King 334, 350
v. Newman 254
Grant *v.* Bissett 308
v. Dodge 3
v. Duane 399
v. Mills 673
v. U. S. Bank 308
Graves *v.* M'Call 683
v. Sayre 155
Gray *v.* Baldwin 226
v. Ide 476
v. Jenks 29, 156, 299, 519
Graydon *v.* Church 522, 559, 561
Great Falls *v.* Worcester 158, 163, 169, 571
Gree *v.* Lord 454
Green *v.* Demoss 694, 703
v. Fowler 677
v. Hart 240
v. Kemp 601
v. Price 625
v. Ramage 362
v. Storm 507
v. Tanner 119, 309
v. Tyler 599
Greenwood *v.* Murdock 8
v. Taylor 332
Greer *v.* Chester 310
Gregg *v.* Wells 626
Griffin *v.* Atlantic, &c. 259
v. Cranston 291
Griggsby *v.* Hair 703, 704
Grimes *v.* Doe 593
v. Kimball 531
Grosvenor *v.* Atlantic, &c. 257, 261
v. Day 144
Groton *v.* Boxborough 164, 186
Grover *v.* Thatcher 524, 539
Grow *v.* Albee 604
Growning *v.* Behn 696
Grugeon *v.* Gerrard 339
Gubbins *v.* Creed 89
Gurney *v.* Sepping 565
Guy *v.* Carriere 4

H.

Hackett *v.* Reynolds 656
Hadley *v.* Chapin 503
v. Houghton 15
Hadlock *v.* Bulfinch 483, 499, 518

PAGE

Haffley *v.* Maier 608
Haggarty *v.* Allaire 87
Hagthorpe *v.* Hook 461, 465
Hahn's, &c. 331
Haigh 648
Haley *v.* Bennett 661
Hall *v.* Bell 339
v. Byrne 117
v. Dench 159
v. M'Duff 656
v. Redding 563
v. Savill 44, 50, 153
v. The Sullivan, &c. 5
v. Tufts 293
Halleck *v.* Smith 697, 704
Halliwell *v.* Tanner 377, 383
Halsey *v.* Reed 363, 365, 377
Hamet *v.* Dundass 49
Hamilton, &c. *v.* Reynolds 291
Hammond *v.* Washington 577
Hammonds *v.* Hopkins 39, 77, 391
Hampton *v.* Hodges 227
v. Spencer 54
Hanna *v.* Countryman 167
v. Wilson 698
Handy *v.* Commercial, &c. 485
Hanson *v.* Derby 233, 234
Harbinson *v.* Harrell 469, 729
Hare *v.* Van Deusen 675
Harmer *v.* Priestley 22
Harmon *v.* Short 167
Harper *v.* Barsh 292
Harriett, &c. 286
Harrington *v.* Price 659
Harris *v.* Norton 719
Harrison *v.* Eldridge 512
v. Ferth 300
v. Lemon 34
v. Phillips, &c. 83
v. Roberts 629
v. Trustees, &c. 37, 42, 520
v. Wyse 472
Hart *v.* Chalker 297
v. Goldsmith 593
Hartpole *v.* Walsh 5
Hartshorn *v.* Hubbard 171
Hartwell *v.* Blocker 116
Hartz *v.* Woods 415
Harvie *v.* Banks 165
Haskell *v.* Haskell 533
Hastings *v.* Adams 194
v. Stevens 444, 445
Hatch *v.* Dwight 238
v. Kimball 123, 535
Hatz's, &c. 11
Heighway *v.* Pendleton 158, 531

	PAGE
Helmbold *v.* Man	535
Hemenway *v.* Bassett	494, 509, 512
v. Stewart	563
Henderson *v.* Burton	671
v. Herrod	253
v. Pilgrim	581
Hendricks *v.* Robinson	317
Hendrickson's, &c.	329
Henkle *v.* Allstadt	360
Henry *v.* Bell	116
v. Davis	69
Henry's case	445
Henshaw *v.* Wells	200, 341
Hensicker *v.* Lamborn	491
Hepburn *v.* Snyder	67
Herbach *v.* Riley	707
Herbert *v.* Hanrick	166, 729
v. Schofield	671
Herriman *v.* Skillman	360
Hetfield *v.* Newton	601
Hewett *v.* Snare	380
Hewitt *v.* Loosemore	658
Heyer *v.* Pruyn	366
Hicks *v.* Bingham	279
v. Hicks	78, 113
Hiern *v.* Mill	655
Hiester *v.* Midiera	69
Higgins *v.* Frankis	275, 344
Higginson *v.* Dall	255
Higgon *v.* Mortimer	228
Hiles *v.* Moore	478
Hill *v.* Jordan	197
v. Moore	167, 538
v. More	515
v. Payson	514, 518
v. Robertson	21
v. Smith	407
v. West	518
Hildreth *v.* Jones	434
Hilliard *v.* Allen	452
Hills *v.* Eliott	99, 116, 535
Hilt *v.* Holliday	396
Hilton *v.* Catherwood	236, 352
v. Crist	356
Hinchman *v.* Emans	536
Hinson *v.* Partee	65
Hitchcock *v.* Harrington	407
v. U. S., &c.	520
Hitchman *v.* Walton	185, 189
Hitner *v.* Ege	420
Hoag *v.* Rathbun	482
Hobart *v.* Sanborn	167
Hobson *v.* Bell	136
Hockley *v.* Bantock	653
Hodge *v.* Attorney-General	653
Hodgman *v.* Hitchcock	501
Hodgson *v.* Gascoigne	181
v. Shaw	343, 344, 348
Hodson *v.* Treat	159
Hoffman *v.* Lee	628
v. M'Call	391
Hogan *v.* Lepretre	390
v. Stone	449, 454, 466
Hogel *v.* Lindell	66
Hoggatt *v.* Wade	682, 685
Hogins *v.* Arnold	34
Hoitt *v.* Webb	535
Holabird *v.* Burr	337, 351, 450, 453
Holbrook *v.* Finney	34
v. Worcester, &c.	539
Holden *v.* Pike	507, 535
Holliday *v.* Franklin, &c.	728
Hollister *v.* Dillon	577
Holman *v.* Bank, &c.	367
v. Bailey	496
Holmes *v.* Fisher	172
v. Fresh	49
v. Grant	38, 58, 99
Holridge *v.* Gillespie	77, 90
Holton *v.* Button	605
Hone *v.* Fisher	104
Honie *v.* Chittenden	371
Honore *v.* Bakewell	647, 649, 650
Hoogland *v.* Watt	429
Hoole *v.* Attorney-General	721
Hooper	305, 649
Hooper *v.* Ramsbottom	338, 659
v. Wilson	153
Hoopes *v.* Bailey	100, 107
Hopkins *v.* Garrard	685
v. Stephenson	100, 461
Hopper *v.* Sisco	311
Horbach *v.* Riley	706
Horlock *v.* Smith	456, 457
Horton *v.* Horner	705
Hough *v.* Canby	700
v. De Forest	493
v. Osborne	251
Houseman *v.* Chase	608
Houston *v.* Stanton	666, 676, 688, 707
Hovey *v.* Holcomb	66
Howard *v.* Davis	3, 11, 671
v. Gresham	481, 512, 574
v. Halsey	360, 369
v. Harris	68, 70
v. Howard	12, 519, 556
v. Robinson	155, 162
Howard, &c. *v.* McIntyre	16, 618
Howe *v.* Lewis	56, 493
v. Russell	332

	PAGE
Howe *v.* Woodruff	131, 435
Howlett *v.* Thompson	697
Hoxie *v.* Carr	162
Hoyt *v.* Bradley	119
v. Doughty	276
v. Martense	90
Hubbard *v.* Ascutney, &c.	403, 405
v. Savage	322
v. Turner	573
Huckins *v.* Straw	163
Hudson *v.* Ishell	66
Hughes *v.* Edwards	10, 49, 292, 474
v. Graves	180
v. Kearney	673, 688
v. Worley	311
Hugunin *v.* Starkweather	487
Hulet *v.* Sollard	28
Huling *v.* Drexell	88
Hulings *v.* Guthrie	718
Humphrey *v.* Harrison	227
Humphreys *v.* Snyder	41
Hungerford *v.* Clay	255
Hunt *v.* Acre	445
v. Clark	640
v. Dupuy	12
v. Hunt	165, 166, 238, 524, 540
v. Maynard	56, 391
v. Tyler	81, 404
Huntington *v.* Smith	249, 277, 278
Hurd *v.* Robinson	296
Hurst *v.* Hurst	723
Hutchins *v.* Carleton	535, 539
v. Cleveland, &c.	258
Hutchinson *v.* Dearing	194, 200
v. Patrick	660
Hyde *v.* Dallaway	166
Hyland *v.* Stafford	603
Hyndman *v.* Hyndman	137, 142
Hynes *v.* Rogers	489

I.

Ibbetson *v.* Ibbetson	386
Ibbotson *v.* Rhodes	626
Ing *v.* Cromwell	189
Inge *v.* Boardman	376
Insurance Co. *v.* Woodruff	256
Ipswich, &c. *v.* Story	502
Ireson *v.* Denn	305
Irwin *v.* Davidson	661, 675
v. Longworth	354, 355
v. Tabb	336

J.

	PAGE
Jack *v.* Woods	91
Jackman *v.* Halleck	705
Jackson *v.* Bowen	597
v. Bronson	163, 239
v. Colden	592
v. Craft	516
v. Davis	481
v. De Lancy	285
v. Farmers', &c.	260
v. Ford	48
v. Fuller	197
v. Henry	598
v. Hopkins	192
v. Jackson	57
v. Laughhead	193, 197
v. Massachusetts, &c.	160
v. Myers	192, 239
v. Packard	588
v. Pierce	18
v. Stackhouse	197
v. Tift	520
v. Vernon	223
v. Willard	155, 237, 240, 407
Jacob *v.* Milford	204
Jacoway *v.* Gault	716
Jacques *v.* Weeks	34, 45, 46, 60, 73
James *v.* Biou	395
v. Fiske	11
v. Johnson	47, 317, 578
v. Morey	316, 521, 538, 567, 573, 641
v. Rice	649, 650, 714
Jamieson *v.* Bruce	158, 170
Jaques *v.* Esler	613
Jarvis *v.* Rogers	317
v. Whitman	347
v. Woodruff	11
Jason *v.* Eyres	53, 70
Jefferson *v.* Prentiss	253
Jencks *v.* Alexander	148
Jenkins *v.* Eldredge	454
v. Quincy, &c.	153, 255, 279
Jenness *v.* Robinson	405
Jennings *v.* Ward	86, 87
v. Wood	520
Jennison *v.* Hapgood	444
Jennot *v.* Cooly	179
Jerome *v.* Seymour	525
Jewett *v.* Hart	240
v. Partridge	166
Johnson *v.* Bartlett	287, 288
v. Bourne	317, 507
v. Brown	245, 276

PAGE

Johnson *v.* Candage 247, 403
v. Cawthorn 671
v. Dopkins 28
v. Elliot 517
v. Gere 614
v. Hart 240
v. Johnson 367, 544
v. Jones 200
v. Nations 510
v. Rice 454
v. Slawson 660
v. Stagg 657
v. Stevens 420
v. Sugg 697
v. White 227, 365
Johnson's, &c. 327
Johnston *v.* Union, &c. 698
Jones *v.* Bruce 380
v. Clarke 207
v. Hubbard 591
v. Phelps 328
v. Quinnipiack, &c. 352
v. Smith 305, 475, 640, 723
v. Thomas 167, 181
Jordan *v.* Fenno 66
Joynes *v.* Statham 54
Judd *v.* Flint 646
Jumel *v.* Jumel 378
Justice *v.* Uhl 330

K.

Kauffelt *v.* Bower 670
Kearney *v.* Post 27
Keech *v.* Hall 182, 197, 274
Kelleran *v.* Brown 55
Kelly *v.* Bryan 61
v. Payne 661, 703
v. Perseverance, &c. 331
v. Thompson 37, 38
v. Wood 516
Kellogg *v.* Rand 360
v. Rockwell 343, 450
Kelso *v.* Kelly 330
Kemp *v.* Earp 62
Kennaird *v.* Adams 621
Kennedy *v.* Green 723
v. Nedrow 421
v. Ross 292
Kenney *v.* McCullough 18
Kent *v.* Allbritain 39
v. Kensington 180
v. Laffan 396
Kercheval 700

PAGE

Kernochan *v.* New York, &c. 256, 260
Kerr *v.* Gilmore 37
v. Hazlerigg 702
Ketchum *v.* Johnson 101
Keyes *v.* Wood 247
Keys *v.* Williams 651, 652
Kilborn *v.* Robbins 329, 331, 358
Killinger *v.* Reidenhauer 437
Kilpatrick *v.* Kilpatrick 685
Kimball *v.* Lockwood 151, 200
Kimmell *v.* Willard 333
Kinnaman *v.* Henry 503
King 304
King *v.* Bromley 75
v. Duntz 149
v. Edington 150
v. Harring 247
v. Harrington 728
v. Heenan 139
v. King 109
v. Little 56
v. M'Vickar 340, 350, 531, 548, 718
v. Newman 101
v. St. Michael's, &c. 154, 164
v. The Merchants', &c. 390
v. The State, &c. 21, 256, 260, 269, 390, 469
v. Whitely 117, 362
Kinley *v.* Hill 495, 513
Kinna *v.* Smith 236
Kinnear *v.* Lowell 545
Kinney *v.* M'Cullough 18
Kinnoul *v.* Money 13
Kintner *v.* Blair 25, 44
Kirke *v.* Kirke 380
Kirksey *v.* Mitchell 707
Kittredge *v.* M'Laughlin 455
v. Rockingham, &c. 256, 257, 269
Kleiser *v.* Scott 695, 699
Kline *v.* Lewis 693
Klock *v.* Cronkhite 416, 521
Knaub *v.* Essick 192
Knickerbacker *v.* Boutwell 360, 543, 719
Knisely *v.* Williams 698
Knowles *v.* Lawton 361, 520, 552
v. Maynard 202
Knox *v.* Moatz 357
Kortright *v.* Cady 470
Kramer *v.* Bank, &c. 319, 354
Kunkle *v.* Wolfersberger 100, 105
Kyles *v.* Tait 698, 709

L.

	PAGE
Laberge *v.* Chauvin	251
Lackey *v.* Holbrook	168
Ladd *v.* Wiggin	524, 535
Lady, &c. *v.* M'Namara	561, 562
Lafarge *v.* Bell	161, 361, 367
v. Herter	344, 348
Lagow *v.* Badollet	679
Lake *v.* Brutton	351
Lamb *v.* Foss	153
Lambert *v.* Hall	293, 547
L'Amoreux *v.* Vandenburgh	626, 630
Lamson *v.* Falls	569
v. Sutherland	311
Lancaster *v.* Evors	13
Langdon *v.* Keith	247
v. Paul	229
Langston	654
Lane *v.* Hitchcock	232
v. King	181, 192
v. Losee	587
Lanfair *v.* Lanfair	121
Langley *v.* Bartlett	483
Langton *v.* Langton	475
Langstaffe *v.* Fenwick	476
Lanoy *v.* Athol	340
v. Duke, &c.	342
Larimer's, &c.	3
Larned *v.* Clark	187
Larrabee *v.* Lumbert	269
Lasselle *v.* Barnett	611
Latimer *v.* Moore	448
Latouche *v.* Dunsany	718
Lauman	706, 711
Lawrence *v.* Delano	626
v. Knapp	248
v. Lane	490
v. Lawrence	511
Lea *v.* Dozier	347
Leavitt *v.* Pell	627
Ledyard *v.* Butler	144
v. Chapin	481
v. Evans	66
Lee *v.* Munroe	641
v. Porter	18, 616
v. Stone	313
Leeds *v.* Cameron	321
Leffler *v.* Armstrong	129, 141, 145
Leggett *v.* Bullock	716
Leman *v.* Newnham	380
v. Whitley	681
Lewis *v.* Caperton	691
v. De Forest	321, 351, 471
v. Menzel	621
v. Nangle	73, 381
v. Rolands	66
v. Smith	426
v. Starke	253
v. Wayne	324
Lewthwaite *v.* Clarkson	652
Ligon *v.* Alexander	678
Lincoln *v.* Purcell	683
Lindley *v.* Sharp	66
Lingan *v.* Henderson	708
Little *v.* Brown	390, 675
Littlefield *v.* Crocker	436
Littlejohn *v.* Gordon	708
Livingston *v.* Jones	563
Lloyd *v.* Mason	478
v. Scott	600
Loaring	673
Locke *v.* North American, &c.	255
Lockwood *v.* Mitchell	586
Lofsky *v.* Manger	478
Long *v.* Storie	477, 592
Longstaff *v.* Meagoe	461
Longstreet *v.* Shipman	524
Longwith *v.* Butler	131
Loomer *v.* Wheelwright	11, 16, 536, 555
Loomis *v.* Lincoln	663
Loring *v.* Cook	279
v. Manufacturers', &c.	257
Loud *v.* Lane	396, 551
Lovering *v.* Fogg	37, 160
Lovett *v.* Demarest	722
v. Dimond	571
Lowell *v.* Mutual, &c.	712
v. Shaw	156
Lowndes *v.* Chisholm	461
Lowrey *v.* Tew	397
Loyd *v.* Currin	2
Lucas *v.* Comerford	223
Ludlow *v.* Grayall	713
Lull *v.* Matthews	22, 186, 232
Lund *v.* Lund	36
v. Woods	435
Lyford *v.* Ross	562
Lyle *v.* Ducomb	317
Lyman *v.* Green	690
v. Little	334, 468
v. Lyman	360, 368
Lynch *v.* Dalzell	257
v. Utica, &c.	25
Lyster *v.* Dolland	408

M.

PAGE

M'Alpin *v.* Burnett 678, 683, 686, 702
M'Brayer *v.* Collins 683, 687, 702
M'Cabe *v.* Bellows 440, 441, 443
M'Call *v.* Lenox 194, 280
M'Cammon *v.* Worrall 329
M'Candlish *v.* Keen 680
M'Carron *v.* Cassidy 449, 460
M'Clure *v.* Harris 699
M'Connel *v.* Holobush 395, 450, 461, 465
M'Connell *v.* Hodson 232
M'Cormick *v.* Digby 406, 486, 563, 629
M'Cown *v.* Jones 626
M'Cumber *v.* Gilman 461, 462
M'Daniels *v.* Bank, &c. 513
v. Colvin 316, 320, 324
v. Lapham 455, 513
M'Dermott *v.* Bank, &c. 345
M'Donald *v.* Black 257
v. M'Donald 481, 484
M'Dougald *v.* Capron 398
M'Gan *v.* Marshall 38, 237, 277
M'Gintry *v.* Reeves 611
M'Given *v.* Wheelock 501, 536
M'Goodwin *v.* Stephenson 158
M'Gready *v.* M'Gready 86
M'Hendry *v.* Reilly 690
M'Intyre *v.* Humphreys 57
v. Whitfield 167
v. Williamson 526
M'Isaacs *v.* Hobbs 510
M'Iver *v.* Cherry 423
M'Kecknie *v.* Hoskins 721
M'Killip *v.* M'Killip 679
M'Kimm *v.* Mason 178
M'Kircher *v.* Hawley 203
M'Knight *v.* Brady 683
M'Lanahan *v.* M'Lanahan 40
v. Reeside 670
M'Laughlin *v.* Shepherd 48
M'Laurin *v.* Wright 61
M'Lean *v.* Lafayette, &c. 344, 367
v. Ragsdale 423
v. Towle 345
M'Lemore *v.* Mabson 616
M'Mahan *v.* Kimball 423
M'Menomy *v.* Murray 393
M'Millan *v.* Gordon 558
v. Richards 236, 482
M'Murray *v.* Connor 585
M'Nair *v.* Lott 32
M'Reth *v.* Symmons 697

PAGE

M'Taggart *v.* Thompson 159
M'Vay *v.* Bloodgood 254
Mackey *v.* Brownfield 610
Mackreth *v.* Symmons 625, 697, 712
Macomber *v.* Mutual, &c. 260, 263, 540
Magee *v.* Beatty 728
Magill *v.* Hinsdale 207
Magruder *v.* Offutt 401
v. Peter 603, 708
Major *v.* Ward 137
Makenzie *v.* Gordon 332
Malin *v.* Coult 689
Mallett *v.* Page 532
Mallory *v.* Aspinwall 520, 589
v. Hitchcock 11, 535
Mandeville *v.* Welch 652
Manhattan, &c. *v.* Evertson 716
Manigault *v.* Deas 503
Manlove *v.* Bale 140, 698
Manly *v.* Slason 671, 697, 698, 700
Mansell, &c. 378
Mansony *v.* U. S., &c. 211
Mantz *v.* Buchanan 426
Manufacturers', &c. *v.* Bank, &c. 34, 45
Maples *v.* Maples 622
Marden *v.* Babcock 36, 622
Margrave *v.* Le Hooke 304
Marine, &c. *v.* Biars 468
v. Early 669
Markell *v.* Eichelberger 485
Marlow *v.* Smith 285
Marquis, &c. *v.* Higgens 87
Marriott *v.* Givens 129
v. Handy 525
Marsh *v.* Austin 279
v. Pike 361, 363
v. Rice 551
Marshal *v.* Lewis 10
Marshall *v.* Billingsley 573, 619
v. Stewart 43, 83
Marston *v.* Brackett 619, 624, 636
Martha, &c. 134
Martin *v.* Jackson 161
v. Lundie 705
v. Mowlin 272, 274
v. Rapelye 295
Martineau *v.* M'Collum 574
Marvin *v.* Dennison 163
v. Vedder 494
Maryland, &c. *v.* Wingert 487
Mason, &c. 380
v. Hearne 25, 61
v. Moody 96
Massaker *v.* Mackerley 512, 514

PAGE
Massachusetts, &c. *v.* Wilson 208, 211
Mathews *v.* Aikin 343, 366
Mathewson *v.* Smith 437
Matthews *v.* Wallwyn 237, 571, 573, 578
Mattheson *v.* Hardwicke 384
Matthie *v.* Edwards 137
Maunce *v.* Byars 684
Maxwell *v.* Montacute 54
May *v.* Eastin 69, 90
v. Lewis 671
Mayburry *v.* Brien 426
Mayham *v.* Coombs 728
Maynard *v.* Hunt 515
Mayo *v.* Fletcher 28, 155
v. Judah 87
v. Tompkins 360
Mayor, &c. *v.* Blamire 223
Meacham *v* Fitchburg, &c. 152
Mead *v.* York 495
Meaden *v.* Sealy 479
Mechanics', &c. *v.* Edwards 602
Medley *v.* Davis 675, 676
v. Mask 569
Megginson *v.* Harper 204
Meigs *v.* Dimock 672, 680
Melland *v.* Gray 320
Mellor *v.* Lees 104, 110
Meltenberger *v.* Beacom 255
Mendenhall *v.* West, &c. 9
Mennude *v.* Delaire 393
Merithew *v.* Sisson 150
Merriam *v.* Barton 466
Merrills *v.* Swift 297
Merritt *v.* Lambert 21, 516
Metropolitan, &c. *v.* Brown 210
Mevey 371
Miami, &c. *v.* Bank, &c. 49, 67, 90, 342
Michener *v.* Cavender 11
Mickles *v.* Dillaye 466
v. Townsend 158
Middleton *v.* Middleton 376
Miles *v.* Gray 252
Miller *v.* Donaldson 491
v. Helm 719
v. Lincoln 450
v. Marckle 611
v. Moore 2
v. Musselman 351
v. Stump 426, 690
v. Tipton 587
v. Townsend 522, 535
v. Wack 352
v. Whittier 320, 468
Mills *v.* Comstock 719
PAGE
Mills *v.* Darling 25, 37
v. Mills 79
v. Van Voorhies 3
Milton *v.* Dunn 203, 645
Mims *v.* Lockett 671, 683, 687, 700, 702
v. Macon 666, 667, 681, 709
Miner *v.* Stevens 167, 183
Mitchell *v.* Burnham 4, 580
v. Preston 586
Mix *v.* Cowles 115, 323
v. Hotchkiss 469, 470, 719
Mobile, &c. *v.* Hunt 565
v. Talman 291, 295, 316
Mocatta *v.* Murgatroyd 632
Montgomery *v.* Bruere 29, 422, 424
v. Chadwick 26, 462
Mooney *v.* Brinkley 167
Moore *v.* Anders 661
v. Cable 464
v. Harrisburg, &c. 550, 566
v. Holcombe 671
v. Lesueur 708
v. Madden 43
v. Moberly 351, 356
v. Overseers, &c. 165
v. Poland 10
v. Raymond 702
v. Shultz 502
v. Ware 247
Moore's Appeal 577
Mordecai *v.* Parker 407
Morey *v.* M'Guire 186
Morgan *v.* Chamberlain 525
v. Davis 509, 512, 517
v. Morgan 390
v. Pike 2
v. Tipton 587
v. Woodward 167
Moreton *v.* Buckner 129, 496
v. Harrison 708
Morford *v.* Bliss 630
Moroney's, &c. 331
Morris *v.* Floyd 601, 602
v. McConnaughy 382
v. Nixon 49, 51, 65, 112
v. Oakford 363, 547
Morrison *v.* Bean 9, 129
v. Buckner 476
v. McLeod 178, 233
Morse *v.* Clayton 482
Mosely *v.* Garrett 17, 707
Moses *v.* Murgatroyd 56, 137
Moss *v.* Gallimore 183, 212
Motley *v.* Manufacturers', &c. 255
Mott *v.* Clark 415, 581, 582

PAGE
Mott *v.* Harrington 63
v. Walkley 391
Mounce *v.* Byars 632
Mount *v.* Suydam 678
Mullanphy *v.* Simpson 403
Mumford *v.* American, &c. 586
Munro *v.* Merchant 716
Murdock 227, 228
Murdock *v.* Chapman 157
v. Chenango, &c. 266, 635
Murphey *v.* Trigg 66
Murphy *v.* Calley 23, 68, 96, 115
Murray *v.* Able 702
v. Barney 315
Myers *v.* White 199

N.

Nairn *v.* Prowse 673
Napier *v.* Elam 612
Nash *v.* Preston 23
v. Spofford 12
Natchez *v.* Minor 253, 614
Naylor *v.* Throckmorton 716
Neale *v.* Hagthorpe 454, 465, 466, 469
Neas's, &c. 664
Neefus *v.* Vanderveer 591
Neeson *v.* Clarkson 681
Neil *v.* Kinney 664, 682, 700
Neilson *v.* Lagow 160
Nelson *v.* Boyce 314
v. Lee 512
Neptune, &c. *v.* Dorsey 558
Newall *v.* Wright 216, 334
Newcomb *v.* Bonham 34, 68
Newell *v.* Hurlburt 357
New England, &c. *v.* Merriam 3, 328, 511, 515, 535, 539, 541
New Hampshire, &c. *v.* Willard 292, 320, 485
Newton *v.* Cook 441, 444
New York Life, &c. *v.* Smith 581
New York, &c. *v.* Howard 505
v. Peck 724
v. White 725
Nichols *v.* Baxter 257, 268
v. Cosset 589
v. Reynolds 49, 166
Niles *v.* Nye 435
Noel *v.* Jevon 23
Norris *v.* Wilkinson 648
Norrish *v.* Marshall 573
North *v.* Belden 296
v. Crowell 316
Northampton, &c. *v.* Ames 198
PAGE
Northrup *v.* Cross 714
Norton *v.* Coons 344
v. Stone 727, 728
v. Warner 332
v. Warren 560
Norvel *v.* Johnson 703
Norwich *v.* Hubbard 151, 248
Nottingham *v.* Calvert 2
Noyes *v.* Clark 583
v. Sturdivant 48
Nugent *v.* Riley 40

O.

Oakham *v.* Rutland 164
Ogden *v.* Grant 393, 394
Ogle *v.* Ship 283
Ohio, &c. *v.* Ledyard 724
Oldham *v.* Halley 100
v. Olley 169
Olmstead *v.* Elder 76, 162, 239, 538
Ord *v.* M'Kee 236, 252
Orde *v.* Heming 5
Ormsby *v.* Phillips 520
v. Tarascon 141, 142
Orr *v.* Hadley 165
v. Hancock 296
Orvis *v.* Newell 312, 349
Osborn *v.* Carr 312
v. Tunis 281
Otis *v.* Sill 626
Ott *v.* King 668
Ottaway, &c. *v.* Murray 88
Otter *v.* Vaux 144
Ottman *v.* Moak 344
Ouseley *v.* Anstruther 380
Overton *v.* Bigelow 65, 88
Owen *v.* Moore 663, 671, 677, 683
Oxenham *v.* Esdaile 713
Oxford *v.* Rodney 385

P.

Packard *v.* Agawam, &c. 258
Page *v.* Broom 216, 455
v. Foster 100, 468
v. Pierce 241
v. Robinson 228
Pain *v.* Smith 652
Paine *v.* French 252, 633
v. Mason 28, 720
Palmer 697
Palmer *v.* Foote 411
v. Fowley 308, 310, 339, 341
v. Gurnsey 26

	PAGE
Palmer *v.* Mead	623
v. Yates	575
Palmes *v.* Danby	44
Pannell *v.* Farmers', &c.	664
Panthing *v.* Barrow	226
Pardee *v.* Van Anken	555
Pargeter *v.* Harris	216
Parish *v.* Gilmanton	151, 244
Parker *v.* Barker	610, 622
v. Green	471
v. Kelly	702
v. Lincoln	16
v. Parker	294, 458, 546
Parkhurst *v.* Alexander	727
Parkman *v.* Welch	358, 367
Parsons *v.* Freeman	381
v. Mumford	43
v. Welles	22, 28, 30, 272, 514
Partington *v.* Woodcock	206
Partridge *v.* Bere	185
v. Partridge	565
Pascal *v.* Sauvinet	11
Pascon *v.* Paul	517
Patch *v.* King	533
Patchin *v.* Pierce	57
Patterson *v.* Edwards	694
v. Esterling	636
v. Yeaton	85
Pattison *v.* Horn	26
v Hull	241
Patty *v.* Pease	368
Patton *v.* Page	376
Paulling *v.* Barron	390
Pawlett *v.* Attorney-General	282, 392, 399, 401
Paxon *v.* Paul	517
Paxton *v.* Harrier	367
Payne *v.* Atterbury	712
Peabody *v.* Fenton	583
v. Patten	11, 15, 308
v. Washington, &c.	258
Peake,	673
Pearce *v.* Savage	515
Pearsall *v.* Kingsland	595, 600
Pearson *v.* Morgan	639
Pease *v.* Benson	570
Peck *v.* Mallams	726
Peet *v.* Beers	695
Pelby *v.* Wathen	298
Pell *v.* Ulmar	77, 390
Peltz *v.* Clarke	554
Penniman *v.* Hollis	29, 115
Pennington *v.* Hanby	74
Penrhyn *v.* Hughes	460
People *v.* Miner	530
Perkins *v.* Dibble	39, 151, 518
v. Drye	85
Perkins *v.* Pitts	491
Perry *v.* Brinton	491
v. Meddoweroft	97
v. Pearson	65
Perry's, &c.	3
Peter *v.* Russell	642
Peters *v.* Goodrich	485, 498, 719
v. Florence	512
v. Jamestown, &c	238
Peterson *v.* Clark	230
v. Willing	60
Pettat *v.* Ellis	508
Pettee *v.* Case	122, 156
Pettengill *v.* Evans	463
Pettibone *v.* Stevens	340, 469, 612
Phelps *v.* Rolfe	528, 547
v. Sage	516
Pheton *v.* Olney	252
Philbrook *v.* Delano	669, 671
Phillips *v.* Bank, &c.	562, 581
v. Hawkins	277
v. Sanderson	699
v. Thompson	352
Phipps *v.* Budd	27
Phœnix *v.* Clark	227
Piatt *v.* Smith	86
Pierce *v.* Brown	186, 280
v. Emery	6
v. Faunce	161
v. Potter	414
v. Taylor	718
Pierson *v.* David	686
Pike *v.* Armstead	729
v. Brown	362
v. Collins	719
Pilkington *v.* Shaller	222
Pinchain *v.* Collard	697
Pintard *v.* Goodloe	663, 668, 688
Planters', &c. *v.* Dodson	695
Platt *v.* Gilchrist	616
v. McClure	130
v. Smith	86
v. Squire	635
Plowman *v.* Riddle	704
Pockley *v.* Pockley	380
Poignard *v.* Smith	271
Poindexter *v.* McCannon	95
Polk *v.* Henderson	192
Pollard *v.* Somerset, &c.	160, 258
Pollexfen *v.* Moore	672, 692
Pomeroy *v.* Burnett	123
v. Lathing	333, 471
Pomet *v.* Seranton	718
Pomroy *v.* Rice	484
Pond *v.* Clarke	485
Pool *v.* Hathaway	526
Pope *v.* Biggs	200, 201

	PAGE
Pope *v.* Onslow	304
Porter *v.* Clements	403
v. Green	161
v. King	417
v. Millet	84
v. Nelson	99, 114
v. Perkins	490
v. Read	396
v. Sealior	360
v. Seeley	516
v. Smith	294
Portwood *v.* Outton	727
Post *v.* Arnot	329, 516, 629
v. Dart	601, 604
v. Dorr	477
v. Tradesmen's, &c.	351, 535
Potts *v.* Arnow	629
Pounds *v.* Gastman	688
Powell *v.* Williams	413, 454
Powers *v.* Russell	624
Powsely *v.* Blackman	176, 182, 194
Poyntnell *v.* Spencer	617
Pratt *v.* Bank, &c.	241, 523, 541
v. Law	608
v. Scholfield	515, 562
v. Thornton	24
v. Van Wyck	677, 679
Prescott *v.* Ellingwood	163
President, &c. *v.* Chamberlin	16
Preston *v.* Christmas	389
Prewett *v.* Dobbs	66, 728
Price *v.* Bury	649
v. Cutts	660
v. Evans	91
Priel	286
Prior *v.* White	625
Proctor *v.* Thrall	526, 527
Propert's, &c.	27
Pryor *v.* Wood	565, 568
Pugh *v.* Holt	153
Purdie *v.* Millett	78
Purefoy *v.* Purefoy	304
Purser *v.* Anderson	500
Purvis *v.* Brown	395
Putnam *v.* Putnam	391
Pynchon *v.* Laster	445

Q.

Quarrell *v.* Beckford	476
Quincy	461
Quincy *v.* Cheeseman	476
Quinebaug, &c. *v.* French	316, 719
Quinn *v.* Brittain	462, 477
v. Quincy	461

R.

	PAGE
Ragsdale *v.* Hagg	678
Ralston *v.* Hughes	165
Rand *v.* Cartwright	396
Randall *v.* Phillips	276
Randell *v.* Mallet	123
Randolph *v.* Gwynne	463
Rands *v.* Kendall	438
Rangeley *v.* Spring	19, 644
Rankert *v.* Clow	5
Rankin *v.* Mortimere	107
Ransone *v.* Frayser	109
Rathbone *v.* Clark	372
Raun *v.* Reynolds	329
Ravenel *v.* Lyles	558
Rawson *v.* Copeland	362
v. Eicke	211
Rayland *v.* The Justices, &c.	236
Raymond *v.* Raymond	239
Raynham *v.* Wilmarth	436
Reading *v.* Weston	64
Receivers, &c. *v.* Godwin	17
Reed *v.* Davis	168
v. Lansdale	66, 314
v. Marble	728
v. Reed	461, 468
Reeves *v.* Scully	574
Regan *v.* Walker	714
Reid *v.* Bank, &c.	228
Reilly *v.* Mayer	358
Reinbard *v.* Bank, &c.	351
Reitenbaugh *v.* Ludwick	36, 37, 449
Relfe *v.* Relfe	708
Remsen *v.* Hay	83
Renn *v.* Ott	7
Repp *v.* Repp	694
Rex *v.* Catherington	164
v. Chailey	164
v. Mattingly	164
v. Olney	164
v. Tedford	164
Rhoades *v.* Canfield	717
v. Parker	120, 172
Rice *v.* Bird	115
v. Rice	83, 115
v. Tower	161
Richards *v.* Bibb	293
v. Chace	4, 151
v. Holmes	128, 142, 294
v. Tims	512, 513
Richardson *v.* Boright	636
v. Brookline	513
v. Baker	677
v. Cambridge	7, 511

	PAGE
Richardson *v.* Field	603, 606
v. Hildreth	281, 284
Richmond, &c. *v.* Woodruff	509
Rickard *v.* Talbird	517
Riddle *v.* Bowman	468
Rigden *v.* Vallier	276
Right *v.* Bucknell	209
Rigney *v.* Lovejoy	243
Ritchie *v.* Williams	502
Ritger *v.* Parker	21, 162, 238
Roach *v.* Cosine	58
Roarty *v.* Mitchell	11, 129, 130, 141
Roath *v.* Smith	516
Robbins *v.* Abrahams	11
v. Eaton	645
Roberts *v.* Bozon	133
v. Halstead	250
v. Robinson	3
v. Rose	692
v. Traders', &c.	265, 266, 270
Robertson *v.* Campbell	313, 587
v. Paul	143, 403
Robinson	3
Robinson *v.* Collier	621
v. Cropsey	95, 106
v. Farrelly	25, 100
v. Guild	593
v. Leavitt	502, 535
v. Preswick	461, 476
v. Robinson	174
v. Sampson	531
v. Urquhart	486, 535
Rochester *v.* Whitehouse	489
Rockwell *v.* Bradley	178, 190
v. Hobby	655, 714
Roe *v.* Pogson	459
v. Soley	304
Rogan *v.* Walker	25, 49
Rogers *v.* Cross	629
v. De Forest	516
v. Grazebrook	169, 176
v. Humphreys	204
v. Mitchell	129
v. Rogers	506
v. Traders', &c.	486
Rolleston *v.* Morton	651
Rood *v.* Winslow	607, 610
Roon *v.* Murphy	697
Root *v.* Bancroft	157, 165, 280, 343
v. Stow	347
Roper *v.* McCook	703
Roscarrick *v.* Barton	31
Roswell *v.* Simonton	18, 403
Ross *v.* Bank, &c.	729
v. Haines	363
Ross *v.* Norvell	66
v. Utter	291
Rossiter *v.* Cossit	437
Rowan *v.* Adams	571
v. Sharps', &c.	8, 316
Rowe *v.* Couch	413
Rowland *v.* Day	687
Rowntree *v.* Jacob	676
Royce *v.* Burnell	315
Ruby *v.* Abyssinian, &c.	167
Ruckman *v.* Astor	448, 453
Ruggles *v.* Barton	539
v. Williams	65, 163, 236, 240, 726
Runlet *v.* Otis	61
Runyan *v.* Mersereau	240
Russcombe *v.* Hare	14
Russell *v.* Blake	461
v. Kenney	363
v. Piston	363, 548
v. Russell	648
v. Southard	82, 98, 100
v. Todd	708
Russell's Appeal	702
Ryall *v.* Rolle	657
Ryan *v.* Shawneetown	343

S.

	PAGE
Sage *v.* Phelps	516
Salem *v.* Edgerly	359
Salmon *v.* Clagett	227
v. Dean	564
v. Hoffman	697
Saloway *v.* Strawbridge	143
Sampson *v.* Pattison	29, 393
v. Williamson	138
Sanders *v.* Reed	229
v. Richards	137
Sandon *v.* Hooper	234
Sanford *v.* Wheeler	323
Satterthwaite *v.* Kennedy	168
Saunders *v.* Frost	55, 449, 450, 464, 469, 472
v. Leslie	673
Sauvemet *v.* Landreaux	725
Savage *v.* Carter	505
v. Dooley	236
Scales *v.* Maud	514
Schanck *v.* Arrowsmith	699
Schenck *v.* Ellingwood	623
Schmidt *v.* Hayt	716
Schnell *v.* Schroeder	503
School, &c. *v.* Wright	661
Schoeder *v.* Patterson	700

	PAGE
Schrymer *v.* Teller	332, 361
Scott *v.* Brest	451, 476
v. Britton	65, 99
v. Crawford	677
v. Fields	113
v. Henry	37, 101
v. McFarland	34, 281, 284
Seals *v.* Cashin	393
Sears *v.* Seahor	21
v. Smith	675, 697
Second, &c. *v.* Platt	130
Sehaor *v.* Robbins	360
Sell *v.* Miller	10
Sellers *v.* Stalaye	61
Sentill *v.* Robeson	420
Servis *v.* Beatty	664, 674
Sessions *v.* Bacon	11
Sevier *v.* Greenway	71
Seymour *v.* Preston	330
Shaeffer *v.* Chambers	450, 456
Shafto *v.* Shafto	383
Shall *v.* Biscoe	683, 688, 697, 705
Shannon *v.* Bradstreet	274
v. Marsellis	360
Shapley *v.* Rangeley	399, 552
Sharp *v.* Kerns	702
Shaver *v.* Bear, &c.	608
Shaw *v.* Erskine	35
v. Gray	364
v. Hoadley	401
v. Loud	561
Shay *v.* Patty	700
Sheckell *v.* Hopkins	85
Sheidle *v.* Weishlee	14
Shelby *v.* Perrin	698
Shelton *v.* Hampton	520
v. Tiffin	700
Shepard *v.* Philbrick	181
v. Richards	177
v. Shepard	317, 350
Sheperd *v.* Adams	360
Shepley *v.* Rangeley	583, 626
Sherman *v.* Abbot	514, 523
v. Gassett	589
v. Sherman	480, 511
Sherwood *v.* Dunbar	481
v. Elslow	511
Shirley *v.* Shirley	113
v. Sugar, &c.	669
Shirras *v.* Caig	323
Shitz *v.* Dieffenbach	657
Shiveley *v.* Jones	624
Shute *v.* Grimes	170
Shuttleworth *v.* Laycock	304
Silver, &c. *v.* North	330
Silvester *v.* Jarman	36, 286, 287, 390
Simers *v.* Saltus	207
Simonds *v.* Brown	336
Simonton *v.* Gandolfo	526
Sims *v.* Helling	654
Sinclair *v.* Armitage	7
Siter *v.* M'Clanachan	308
Skaggs *v.* Nelson	666, 696
Skeel *v.* Spraker	362, 371
Skeffington *v.* Whitehurst	395
Skillman *v.* Teeple	324, 344
Skinner *v.* Cox	24, 728
v. Miller	600
Slack *v.* M'Lagan	677
Slaughter *v.* Detiney	3, 9
v. Foust	251
Slee *v.* Manhattan Co.	89, 148, 560
Slocum *v.* Catlin	535
Smartle *v.* Williams	176
Smith *v.* Blaisdell	28
v. Bovin	129
v. Cannell	126
v. Clark	574
v. Columbian, &c.	256
v. Dyer	169, 283
v. Empire, &c.	258, 259
v. Gage	671, 713
v. Goodwin	229
v. Jordon	727
v. Kelley	21, 246, 403
v. Manning	401
v. Mobile, &c.	721, 729
v. Moore	156, 230
v. Otley	390, 516
v. People's, &c.	115
v. Pilkington	215
v. Porter	167
v Prince	485
v. Province	10, 141
v. Shepard	203
v. Smith	244, 332, 511
v. Stanley	3, 483
v. Taylor	167, 199
v. Vincent	515
Snow *v.* Stevens	421
Snyder *v.* Snyder	520
Soar *v.* Dalbey	474
Soher *v.* Kemp	342
Solms *v.* M'Culloch	719
Solomon *v.* Sparks	621
v. Wilson	93
Somers *v.* Barrett	61
Somersworth *v.* Roberts	4
Souders *v.* Van Sickle	204
Southerin *v.* Mendum	247
Spader *v.* Lawler	318
Sparhawk *v.* Mills	467

	PAGE
Sparkes v. Smith	222
Sparks v. State Bank	719
Speakman v. Speakman	23, 158
Speer v. Whitfield	318, 522
Spencer v. Ayrault	520, 535, 611
Spofford v. Hobbs	643
Sprague v. Graham	623
Sprigg v. Lyles	343, 729
Spring v. Haines	68, 403
v. Hill	482
Springer v. Walters	664, 676
Spurgeon v. Collier	73
St. Andrews, &c. v. Tompkins	327
St. John v. Bumpstead	361
v. Turner	78
Stabback v. Leat	131
Stafford v. Ballou	637
v. Van Rensselaer	684
Stamford, &c. v. Benedict	341, 509
Stamper v. Johnson	66
Stanley v. Beatly	251
Stansell v. Roberts	696, 728
Stapp v. Phelps	605
Stark v. Boswell	529
State v. Laval	23, 30
State, &c. v. Campbell	335, 344, 658
v. Tweedy	251
Stedman v. Cassett	192, 194, 200
Steedman v. Poole	723
Steel v. Black	62
Steele v. Adams	510, 621
Stehley v. Irvin	612
Stelle v. Carroll	425
Stemmons v. Duncan	356
Stephens, &c.	664
Stephens v. Barrett	729
v. Sherrod	116
Stephenson v. Thompson	42
Stetson v. Gulliver	44
Stevens v. Brown	167
v. Cooper	57, 664
Stevenson v. Black	241, 362
Stewart v. Anderson	554
v. Hutchins	24
v. Ives	671, 683
v. Preston	237, 354
Still v. Griffin	682
Stockard v. Stockard	351
Stockett v. Taylor	714
Stocking v. Fairchild	39
Stockton v. Johnson	252
Stoever v. Stoever	113
Stokes v. Russell	216
Stone v. Evans	221, 223
Stoney v. American, &c.	591
v. M'Murray	100
Stoney v. Shultz	150, 466
Story v. Johnson	645
Stover v. Bounds	67
v. Harrington	351, 354, 521, 622
Stowell v. Pike	228
Strachn v. Foss	486
Stratton v. Sabin	26
Streator v. Jones	100
Strong v. Blanchard	355, 460, 462, 472
v. Manufacturers', &c.	257
v. Stewart	57
v. Strickland	163
Stronge v. Hawkes	631
Stroud v. Casey	359
Stuart v. Abbott	694
v. Kissam	532
Stuyvesant v. Hall	324, 368
Sumner v. Barnard	126
Sumpter v. Cooper	658
Swabey v. Swabey	536
Swaine v. Perine	441
Swan v. Patterson	349
Swarthout v. Curtis	721
Sweet v. Van Wyck	58, 560
Sweetman v. Ambler	2, 122
Swett v. Horn	21
Swift v. Kroemer	545
v. Vermont, &c.	255
Symons v. James	377, 380, 388
Syracuse, &c. v. Tallman	153, 167, 210, 475

T.

Tabele v. Tabele	427
Taggart v. Thompson	159
Tallman v. Ely	515
Tanner v. Wells	311
Tardiffe v. Schrugan	672
Tasburgh v. Ecklin	80
Taylor v. Adams	699
v. Alloway	678
v. Baker	723
v. Baldwin	60, 691
v. Chowning	129
v. Cole	629
v. Foote	705
v. Hunter	683
v. Luther	64, 65
v. Maris	329
v. Thomas	722, 727
v. Townsend	463
v. Weld	35, 37, 167

	PAGE
Teaff *v.* Ross	500
Teed *v.* Carruthers	488
Teeter *v.* Pierce	355
Ten Eyck *v.* Holmes	353
Tennent *v.* Dewees	451
Tenney *v.* Blanchard	84
Terry *v.* George	702
v. Woods	253, 451
Teulon *v.* Curtis	5
Tharp *v.* Feltz	295, 451, 505
Thatcher *v.* Gammon	603
Thayer *v.* Campbell	237
v. Cramer	150
v. Mann	5
v. Richards	121, 444
Thomas, &c.	481
Thomas *v.* Olney	293
v. Van Kapff	258, 268
Thomaston *v.* Stimpson	50
Thomes *v.* Cleaves	587
Thompson *v.* Boyd	424, 425
v. Chandler	339
v. Diffendufer	475
v. Drake	622
v. McGill	701
v. Mack	44, 78, 729
v. Patton	66
v. Williams	703
Thornbrough *v.* Baker	237, 282
Thorne *v.* Thorne	159
Thorneycroft *v.* Crockett	464
Thornton *v.* Knox	685, 697, 700
v. Pigg	407
v. Wood	279
Thredgill *v.* Pintard	683
Thunder *v.* Belcher	192, 196
Thurston *v.* Kennett	284
Tibeau *v.* Tibeau	54
Tice *v.* Annin	410, 411
Tichenor *v.* Dodd	362
Tichout *v.* Harmon	546
Tiernan *v.* Beam	675, 703
v. Hinman	87
v. Poor	11
v. Shurman	684
v. Thurman	700
Tifft *v.* Walker	44
Tillinghast *v.* Fry	404, 441
Tilford *v.* James	352
Tillon *v.* Kingston, &c.	266, 267
v. Merchants', &c.	255
Tillotson *v.* Boyd	117
Titley *v.* Davis	304
Titus *v.* Neilson	421, 427
Toby *v.* Read	181
Todd *v.* Campbell	53, 61
Toft *v.* Stephenson	685
Tohler *v.* Folsom	656
Tooms *v.* Chandler	122
Torrey *v.* Bank, &c.	316
Towers *v.* Tuscaloosa, &c.	415
Towle *v.* Hoyt	403
Towler *v.* Buchanans	501
Townsend *v.* Ward	362
Traders', &c. *v.* Robert	263, 265, 267
Trenchard *v.* Warner	331
Trenton, &c. *v.* Woodruff	478, 581
Trimble *v.* Reis	10
Tripp *v.* Vincent	375, 482
Troth *v.* Hunt	338
Trotter *v.* Erwin	674
Troughton *v.* Binkes	398
Truebody *v.* Jacobson	697, 700
Truesdell *v.* Callaway	695
Trull *v.* Skinner	83
Trulock *v.* Robey	401, 450
Truscott *v.* King	324, 718
Trustees, &c. *v.* Dickson	157
Tryon *v.* Sutton	608
Tucker *v.* Keeler	180
v. Thurston	392
Tull *v.* Owen	75
Turner *v.* Bouchell	139
v. Camerons, &c.	207
Turnipseed *v.* Cunningham	101
Tuthill *v.* Dubois	716
Tylee *v.* Webb	652
Tyler *v.* Ætna, &c.	676
v. Lake	543
v. Taylor	276, 556
Tyson *v.* Rickard	540

U.

Uhler *v.* Hutchinson	718
Underwood *v.* Courtown	718
Union, &c. *v.* Emerson	463
Union Bank, &c. *v.* Edwards	325
v. Stafford	483
Upham *v.* Brooks	123, 396, 514
Upshaw *v.* Hargrove	690
U. States *v.* Hodge	347
v. Hooe	316, 317
Utley *v.* Smith	316, 323
Uzzell *v.* Mack	700

V.

Vail *v.* Foster	697
Vallance *v.* Savage	204

	PAGE
Valle *v.* American, &c.	527
v. Iron, &c.	531
Van Bergen *v.* Demarest	130
Van Buren *v.* Olmstead	58
Van De Graaff *v.* Medlock	257
Vanderkemp *v.* Shelton	543, 581
Van Deusen *v.* Frink	186
Van Doren *v.* Todd	669, 699
Van Duyne *v.* Thayer	238, 280, 428
Van Hook *v.* Somerville	537
Van Meter *v.* M'Faddin	657
Van Ness *v.* Hyatt	407
Van Pelt *v.* M'Graw	230
Van Rensselaer *v.* Akin	499
v. Stafford	328, 329, 684
Van Riper *v.* Williams	613
Van Vronker *v.* Eastman	440, 443
Van Waggenen *v.* Brown	535
v. Hopper	724
Van Waggoner *v.* M'Ewen	613
Van Wagner *v.* Van Wagner	35, 316
Van Wyck *v.* Alliger	226
Vanneter *v.* Vanneter	318
Vasser *v.* Vasser	66
Veach *v.* Schaup	469, 629
Verner *v.* Winstanley	105, 401
Vernon *v.* Bethell	68, 78
v. Smith	255, 268
Viles *v.* Morlton	558
Viscount, &c. *v.* Morris	389, 398, 480
Voorhies *v.* De Blanc	7
Vose *v.* Handy	246

W.

Waddle *v.* Cureton	504
Wade *v.* Coope	348
v. Howard	518, 555
Wade's case	6
Wadsworth *v.* Loranger	66
Wager *v.* Chew	365
Wagham *v.* Coomes	697
Wakeman *v.* Banks	191
Walcop *v.* M'Kinney	167
Walden *v.* Cabot	164
Waldren *v.* Sloper	714
Wales *v.* Mellen	167, 170, 173
Walker *v.* Baxter	537
v. Paine	291
v. Reeves	223
v. Sedgwick	663, 664, 677, 697
v. Walker	54
Walker *v.* Williams	705
Wall *v.* Boisgerard	296
Wallace *v.* Blair	535, 537
Waller *v.* Tate	252, 418
v. Todd	612
Walling *v.* Aikin	68, 73, 314
v. Cody	2, 129
Wallis *v.* Long	525
Walthall *v.* Rines	329
Walton *v.* Cronly	57, 58
v. Withington	451
Warburton *v.* Lanman	337
v. Mattox	638
Ward *v.* Sharp	596
Warden *v.* Adams	242
Ware *v.* Bennett	512
Waring *v.* Smith	236
v. Ward	385
Warne *v.* Hall	196
Warner *v.* Everett	396
v. Gouverneur	475, 476, 568, 592
Warren *v.* Fenn	661, 662, 666, 667, 676
v. Hamstead	517, 562
v. Warren	537
Washburn *v.* Goodwin	419
v. Titus	68
Waterman *v.* Curtis	451, 604
v. Matteson	228
Waters *v.* Randall	69, 84
v. Wynn	36
Watkins *v.* Gregory	34
v. Stockett	66
Watson *v.* Bane	330, 712
v. Dickens	66, 315
v. Wells	672
v. Willard	701
Watts *v.* Coffin	203
v. Symes	298
Waugh *v.* Riley	10, 509, 520, 524
Way *v.* Patty	683
Wease *v.* Pierce	610
Weaver *v.* Toogood	366
Webb *v.* Flanders	518
v. Patterson	38
v. Rice	60
v. Robinson	683, 691, 705
v. Rork	80
v. Russell	216
Webber *v.* Webber	287
Wedge *v.* Moore	436
v. Russell	105
Weed *v.* Beebe	671, 674
v. Covill	114
v. Lyon	715

	PAGE
Weed *v.* Stevenson	23, 38
Weeks *v.* Eaton	245
Weidner *v.* Foster	199
Welch *v.* Adams	192, 202
Weld *v.* Sabin	335, 537
Welford *v.* Beezely	632
Wellborn *v.* Williams	703
Wells *v.* Morse	402, 535
Wendell *v.* N. H. Bank	43
Wentz *v.* Dehaven	512
West *v.* Reid	723
v. Thornburgh	681
West, &c. *v.* Chester	503
Westerdell *v.* Dale	221, 223
Western, &c. *v.* Eagle	340
Westervelt *r.* Haff	18
Wetherington *v.* Banks	233
Wharf *v.* Howell	60, 113
Wheeler *v.* Bates	192
v. Branscomb	203
v. Montefiore	176
Wheelwright *v.* Loomer	371
Whitaker *v.* Harrold	216
Whitbread	649, 659
Whitbread *v.* Smith	11
v. Jordan	723
Whitcomb *v.* Sutherland	49, 447
White *v.* Brown	256, 469, 471
v. Casanane	682, 688
v. Dougherty	697
v. Hillacre	306
v. Knapp	674
v. Parnther	398
v. Stover	703
v. Vallette	2
v. Whitney	153
Whiting *v.* Beebe	316
Whitney *v.* Buckman	7, 608
v. French	39, 236
v. M'Kinney	568
Whitworth *v.* Gaugain	653
Whittaker *v.* Dick	486
Whittemore *v.* Gibbs	244
Whittick *v.* Kane	57
Wickenden *v.* Rayson	144
Whittrick *v.* Cane	50
Wickersham *v.* Reeves	535, 545
Wikoff *v.* Davis	360
Wilbur *v.* Bowditch, &c.	260
Wilcox *v.* Morris	67, 116
Wilder *v.* Houghton	186
v. Smith	703
v. Whittemore	173
Wildey *v.* Collier	607
Wilkins *v.* French	28, 275
v. Humphreys	704
Wilkinson *v.* Flowers	519
v. Hall	175, 176
v. Russell	320
v. Watts	129, 619, 620
Willett *v.* Winnell	78
Williams *v.* Ayrault	619
v. Birbeck	581
v. Bosanquet	221, 224
v. Bishop	100, 470
v. Hilton	276, 293, 470
v. Kelsey	624
v. Kimball	532
v. Owen	298, 343, 348
v. Roberts	697
v. Sorrell	534
v. Starr	482
v. Stratton	675
v. Thorn	366
v. Thurlow	505, 519
v. Watts	129
v. Woods	689
Williamson *v.* Downs	316, 324
v. Ross	707
Wilson	153, 183
Wilson *v.* Geisler	3
v. Hardesty	596
v. Hayward	254
v. Hooper	192
v. Kimball	625
v. Ring	515
v. Shoenberger	37
v. Soper	537
v. Troup	129, 538
v. Watts	129
Winborn *v.* Gorrell	671
Wing *v.* M'Dowell	727
Winn *v.* Ham	550
Winslow *v.* M'Call	537
v. Merchants', &c.	180
Winter *v.* Anson	673
v. Garrard	505
v. Rose	710
Wires *v.* Nelson	185, 186
Wiseman *v.* Reid	463, 679
Witherell *v.* Hull	165
Withers *v.* Morrell	615
Wofford *v.* Thompson	528
Wolbert *v.* Lucas	123
Wolcott *v.* Sullivan	568, 576, 728
Wolfe *v.* Dowell	516
Wolstan *v.* Aston	76
Womble *v.* Battle	666, 669, 671
Wood *v.* Colvin	143
v. Felton	454
v. Jones	393
v. Lester	666, 668

	PAGE
Wood *v.* Trask	151, 251
Woodard *v.* Fitzpatrick	593
Woodbury *v.* Aikin	525
Wooden *v.* Haviland	617, 618
Woodruff *v.* Robb	40
Woods *v.* Bailey	705
v. Burrough	662
v. Huntingford	384
v. Wallace	2, 100, 445
Woodson *v.* Perkins	314
Woodward *v.* Phillips	462, 467
v. Pickett	23, 186, 228
Woodward's, &c.	362
Woodworth *v.* Guzm	25, 719
Woollen *v.* Hillen	360
Work *v.* Brayton	161, 666
v. Harper	719
Worster *v.* Great Falls, &c.	158
Worthington *v.* Morgan	369
Wortley *v.* Birkhead	298
Wragg *v.* Comptroller, &c.	671
Wright *v.* Atkinson	688, 710
v. Bates	89, 90
v. Lake	151, 229
v. Rose	137, 375
v. Tukey	157
Wrixon *v.* Cotter	80
Wyatt's case	20
Wyatt *v.* Stewart	718
Wyckoff *v.* Remsen	716
Wyman *v.* Babcock	647
v. Hooper	539, 548
Wynkoop *v.* Cowing	77, 103

Y.

Yancy *v.* Mauck	664, 671
Yarborough *v.* Newell	65
Yates *v.* Ashton	109
Yelverton *v.* Shelden	353
Youle *v.* Richards	67, 83
Young *v.* Eagle, &c.	161
v. English	298
v. Roberts	129
v. Tarbell	3
v. Miller	236, 242, 272
v. Wood	700
Youngs *v.* Wilson	323

Z.

Zane *v.* Dickerson	65
Zeiter *v.* Bowman	199
Zekind *v.* Newkirk	67, 236
Zentmyer *v.* Mittower	670

THE LAW OF MORTGAGES.

THE LAW OF MORTGAGES.

CHAPTER I.

1. Definition of a mortgage; mortgage for the purchase-money. Distinction between a mortgage and the *vivum vadium*, &c.
4. What may be mortgaged.
5. Parties to a mortgage: Aliens; married women; infants; joint tenants, &c.
27. Early construction of the condition of a mortgage; performance, tender, &c.
36. Form of expressing the condition; stipulation for reconveyance, &c.
38. Mortgages for years; mortgages of leaseholds.
39. Jurisdiction of Courts of Equity over mortgages.
43. Equity of redemption.

1. Various definitions of a mortgage have been given by different judges and elementary writers, some of which, although presenting a correct general view of the subject, cannot be considered as precisely accurate. Thus, a mortgage has been defined to be a security for repayment of money, or a conveyance of lands by a debtor to his creditor, as a pledge or security for the repayment of *a sum of money borrowed;* with a proviso, that such conveyance shall be void on payment of the money borrowed, with interest, on a certain day.[1] (*a*) It is quite obvious, however, that the ele-

[1] Com. Dig. Mortgage A; 2 Greenl. Cruise, 79. See also Jac. Law Dict. *Mortgage;* 2 Black. Com. 157; Elfe *v.* Cole, 26 Geo. 197.

(*a*) "A mortgage is a contract." Per Woodward, J. Ashhurst *v.* The Montour, &c., 35 Penn. 43; 3 Humph. 464. "A mortgage is always founded on a *loan.*" Chapman *v.* Turner, 1 Call, 252. Mr. Coote says, (Coote, 139,) "A mortgage is a debt by specialty, secured by a pledge of lands, of which the legal ownership is vested in the creditor, but of which, in equity, the

ment of *borrowed money*, as necessary to constitute a mortgage, is wholly fanciful. This definition, if strictly accurate, would exclude that large class of mortgages, perhaps larger than any other whatever, where land is sold and conveyed by one person to another, and the latter at the same time mortgages it back to secure payment of the whole or a part of the purchase-money. (*b*)

---

debtor and those claiming under him remain the actual owners, until debarred by judicial sentence, by legislative enactment, or their own laches." See Loyd *v.* Currin, 3 Humph. 464. At common law, a mortgage must be by deed. Hebron *v.* Centre, &c. 11 N. H. 571. Contra, Woods *v.* Wallace, 22 Penn. 171. An unsealed instrument intended for a mortgage is at most a mere *contract*, gives no lien as against a subsequent assignment with notice for the benefit of creditors, and will be set aside on petition as a cloud upon the title. Erwin *v.* Shuey, 8 Ohio, N. S. 509. See Bloom *v.* Noggle, 4 Ohio St. 45. It is held that the word *mortgage* is a technical term, and to be technically construed. Walton *v.* Cody, 1 Wis. 420. As to the *stamping* of a mortgage, see Morgan *v.* Pike, 25 Eng. L. & Eq. 281; Sweetman *v.* Ambler, 8 Exch. 72. Equity treats as a mortgage the bonds of a corporation, which pledge its property for a debt. White, &c. *v.* Vallette, 21 How. (U. S.) 414. A corporation, holding land under a bond for title upon payment of the purchase-money, agreed that this interest should be mortgaged to certain members, as security for their liability on its account, which agreement was entered in the minutes of the corporation, and a deed of trust made accordingly. Held, the deed was valid in equity, *related* to the original resolution, and should have priority of the lien of an intervening judgment creditor with notice. Miller *v.* Moore, 3 Jones, Eq. 431. See ch. 23, s. 1, *n.*

(*b*) In some respects, by statutory provisions, this class of mortgages is placed on a different footing from any other. Thus in Indiana, Arkansas, and Wisconsin, by statute, the widow of the mortgagor has no dower. Ark. L. 44, 45, 46; Wis. Rev. Sts. 333; Ind. Rev. Sts. (But see Nottingham *v.* Calvert, 1 Cart. 527, that in Indiana she has dower in equity.) Independently of statute, the above is the prevailing rule of law, the husband in such case having only an *instantaneous seisin*, from which the right of dower does not arise. The rule is held to apply to the mortgage of other lands than those conveyed to the mortgagor by the mortgagee. Thus A. conveyed to B., the plaintiff's husband, on the 2d of June, 1821, certain lands in Lancaster. On the 9th of June, C. conveyed to B. lands in Greenland, and B. immediately mortgaged them to A., to secure the purchase-money of the

2. A more correct definition of a mortgage, therefore, would seem to be, the conveyance of an estate by way of

---

lands in Lancaster. Held, that B. had only an instantaneous seisin of the land in Greenland, and his widow was not entitled to dower against A., without contributing her proportion of the mortgage debt for the land in Lancaster. Adams *v.* Hill, 9 Fost. 202. It must be proved that the mortgage and deed constituted but one transaction. Grant *v.* Dodge, 43 Maine, 489. Dower attaches as against all but the mortgagee and his assignees. Young *v.* Tarbell, 37 Maine, 509. If subsequently the money be paid or the mortgage released, the seisin takes effect by relation from the time of the conveyance. Smith *v.* Stanley, 37 Maine, 11. It is held, that, where property has been sold and mortgaged back to secure the purchase-money, the wife, having dower in the equity of redemption, must be made party to the foreclosure of the mortgage, as must also the wives of the mortgagor's grantees. Mills *v.* Van Voorhies, 20 N. Y. (6 Smith,) 412. The grantees of a mortgagor, who has mortgaged the premises to secure the purchase-money, and sells portions of them, subject to the mortgage, are seised of the equity of redemption in these portions, and their wives are respectively entitled to dower subject to the mortgage; and, if they survive their husbands, they can by redeeming the mortgage claim and receive dower. Mills *v.* Van Voorhies, 23 Barb. 125.

"Where a mortgage is made simultaneously with the purchase of land, and as a part of the same transaction, no intervening right of *homestead* is created in the mortgagee." Per Hoar, J. New England, &c. *v.* Merriam, 2 Allen, 391. If one lends money to pay off a mortgage on which a foreclosure sale is about to take place, and immediately takes a mortgage to secure his loan, the two transactions are contemporaneous, and a homestead right which attached after, and therefore subject to the first mortgage, is also subject to the second. Carr *v.* Caldwell, 10 Cal. 380.

In New Jersey and Delaware, (if recorded in sixty days,) a mortgage for the purchase-money is made valid against judgment creditors of the mortgagor. N. J. Rev. St. 644; Dela. Rev. Sts. 269. In regard to *the time of redemption*, a mortgage for the purchase-money does not differ from others. Robinson, 3 Ohio, N. S. 551. Though a very strict foreclosure is sometimes enforced, where the whole of it is unpaid. Wilson *v.* Geisler, 19 Ill. 49. See Howard *v.* Davis, 6 Tex. 174; Dillon *v.* Byrne, 5 Cal. 455; Dutton *v.* Ives, 5 Mich. 515; Slaughter *v.* Detiney, 10 Ind. 103; Larimer's, &c., 22 Penn. 40; Perry's, &c., Ib. 43; Clark *v.* Brown, 3 Allen, 509; ch. 13, s. 1; Cake's, &c., 23 Penn. 186; Alderson *v.* Ames, 6 Md. 52; Deakyne *v.* Love, 5 Harring. 354. In Illinois, a mortgage for the purchase-money, executed at the same time with the deed, whether made to the vendor or to one who advances the money which is paid to the vendor, has pri-

pledge for the security of debt, and to become void on payment of it.[1] Or, a conditional conveyance of land, designed as security for the payment of money, the fulfilment of some contract, or performance of some other act, and to be void upon such payment or performance.[2] Or, an absolute pledge, to become an absolute interest, if not redeemed at a certain time.[3] Or, "a security for the payment of money, or the performance of some prescribed act."[4] (*c*) Or, an estate

[1] 4 Kent, 133.

[2] 1 Hill. on R. P. 371; Montgomery *v.* Bruere, 1 South. 268; Richards *v.* Chace, 2 Gray, 385; per Appleton, J. Mitchell *v.* Burnham, 44 Maine, 299; Somersworth *v.* Roberts, 38 N. H. 24; N. H. Rev. Sts. ch. 131, s. 1, (for a construction of which statute, however, see 40 N. H. 39–40). See also Alderson *v.* White, 4 Jur. N. S. 164.

[3] 1 Pow. 7.

[4] Per Merrick, J. Steel *v.* Steel, 4 Allen, 419, 420.

---

ority of a judgment against the mortgagor. Curtis *v.* Root, 20 Ill. 53. A. entered into a verbal contract with B. and C., to sell them a lot of land. They took possession, and employed D. to erect a building. After he had commenced work, B. and C. received from A. a deed, and at the same time executed a mortgage to him to secure the purchase-money. Held, the mortgage and conveyance, being simultaneous, were in law one act, and A.'s lien was prior to D.'s. Guy *v.* Carriere, 5 Cal. 511.

(*c*) The title of a mortgagee is said to be not a mere *lien*, depending on possession, but a real interest, though conditional. Barnard *v.* Eaton, 2 Cush. 304. It is a *lien*, and something more; a transfer of the property itself, as security both in equity and law. It is a *trust estate*. When the debt is discharged, there is a resulting trust for the mortgagor. A mortgage is called a lien, only in a loose and general sense, in contrast with an absolute and indefeasible estate. Opinion of the U. S. Sup. Ct., cited in Evans *v.* Merriken, 8 Gill & J. 47; Conard *v.* The Atlantic, &c., 1 Pet. 441. The matter must be the subject of stipulation and agreement between the parties. 3 Humph. (Tenn.) 464; 35 Penn. 43.

From these definitions in the text, it may be seen, how a *mortgage* or *dead pledge* differs from another form of security formerly in use, termed *vadium vivum*; or *living pledge*. This contract or conveyance has become nearly obsolete, and therefore requires only a brief notice. The *vadium vivum* was where a man borrowed a certain sum of another, and made over an estate of lands to him, until he had received that sum out of the issues and profits thereof; and was so called, because neither the money nor the lands were lost; for the latter were constantly paying off the former, and were not left as a dead pledge, in case the money was not paid. 1 Pow. 3; Coote, 43. The *vivum vadium* seems to be sometimes substituted in place of an original

upon a condition, defeasible by the performance of the condition according to its legal effect.[1]

[1] Erskine *v.* Townsend, 2 Mass. 495.

---

mortgage. Thus, in a foreclosure suit, the defendant may set up a subsequent written assignment of the rents to be received until full payment of the debt. Angier *v.* Masterson, 6 Cal. 61. Where the mortgagee is to have possession, and pay the debt from the rents, there can be no foreclosure, unless he has rendered an account. Rankert *v.* Clow, 16 Tex. 9.

Still another form of conveyance by way of security, but one rarely adopted in practice, is the *Welsh mortgage*. In a Welsh mortgage, the profits keep down the interest, instead of the principal, as in the *vivum vadium;* and, of course, no length of possession gives the mortgagee an absolute title. But, where the profits are excessive, equity will order an account. 1 Pow. 373, *a*, and *n*, E. See Thayer *v.* Mann, 19 Pick. 538; Conway *v.* Shrimpton, 5 Bro. Parl. 187. It is said, "the right to foreclose is incident to all mortgages, save Welsh mortgages." Per Curtis, J. Hall *v.* The Sullivan, &c. Law Reporter, July, 1853, p. 144. Another form of Welsh mortgage is where the deed is made in trust, that the mortgagee, after paying interest and expenses, shall apply the surplus proceeds to the principal. 3 Pow. 1148, *a;* Coote, 207. In a Welsh mortgage, no covenant for payment of the debt is inserted, and the mortgagee has no remedy to compel redemption or foreclosure in equity, though the mortgagor may redeem at any time. Coote, 222, 223. In some instances the estate is conveyed to the mortgagee and his heirs, till from the rents and profits he shall receive principal and interest, which is *in the nature of a Welsh mortgage*, and was compared by Lord Hardwicke to a tenancy by *elegit*, so that the estate ceased upon payment of the debt, and the mortgagor might maintain ejectment, unless the mortgagee had remained in possession twenty years after such payment; which time would also bar the equity of redemption. And his Lordship said, the mortgagor had the same right as the conusor under the *elegit* had, to come into a court of equity for an account. In a similar case, time was held no bar to redemption, although, by the mortgagor's own showing, more than sixty years had elapsed since the mortgagee took possession. Orde *v.* Heming, 1 Vern. 418; Coote, 223. In Hartpole *v.* Walsh, (5 Bro. P. C. 275,) a bill to redeem a mortgage in the nature of a Welsh mortgage was dismissed in the Irish Chancery, and on appeal to the English House of Lords the judgment was affirmed. In that case, a second mortgage had been made to the same party, conditioned to pay the whole debt at any time after eighteen months' notice; which notice had long since been given. Coote, 223. But in a later case, (Tenlon *v.* Curtis, Younge, 619,) Lord Lyndhurst

3. The name *mortgage* originally signified, that the estate conveyed became *dead* or extinct to the mortgagor, unless the condition was performed at the time appointed. A mortgage was a feoffment upon condition, or the creation of a base or determinable fee, with a right of *reverter* attached to it. The debt was required to be tendered at the time and place prescribed; and, in general, the transaction was held subject to the strict rules which governed conditions.[1]

4. All property, real or personal, corporeal or incorporeal, movable or immovable, may be the subject of mortgage, with the qualification, as is sometimes said, that nothing can be mortgaged, which does not belong to the mortgagor *at the time*;[2] (*d*) thus advowsons, rectories, and tithes; rever-

[1] Wade's Case, 5 Co. 114; Goodall's Case, ib. 95; Lit. § 332; Co. Lit. 205.

[2] Pierce *v.* Emery, 32 N. H. 484.

---

considered this decision to have been made, on the ground of the impossibility of taking the long and complicated accounts after the lapse of ninety years, and of unreasonable delay in prosecuting the suit for redemption. In that case, a reversion in fee, expectant on a life-estate, had been demised for five hundred years, redeemable on payment of the mortgage debt, but without any definite time fixed for payment. The mortgagor covenanted to pay the debt on demand; and that, until payment, the mortgagee might enter and enjoy the premises. Lord Lyndhurst held this to be in the nature of a Welsh mortgage, and dismissed a bill filed for foreclosure.

Mr. Coote says, of the origin of mortgages, — "In early times, the Jews were the great money-lenders. It was held usury for Christians to lend money at interest; and, accordingly, if lands were enfeoffed to a creditor, and the rents and profits received by him, and not applied to the principal of the debt, although not prohibited by the King's Court, it was punishable by forfeiture of his lands and chattels, if he died possessed of the pledge. And this, according to Glanville, was the original meaning of the term *mortuum vadium*, and not the meaning subsequently attached to the word by Littleton and others." Hence, according to Mr. Coote, (Coote, 41,) the *vivum vadium* was a security, by which the rents were from time to time applied to reduce the principal of the debt; the *mortuum vadium*, one by which, till payment of a certain sum, the rents were received by the creditor and not accounted for.

(*d*) The term *equitable mortgage* is sometimes applied, where this requisite of a legal mortgage is wanting. "A mortgage of lands to be afterwards ac-

sions and remainders; (*e*) possibilities; (*f*) rents; franchises. But (it is said) a debtor's wearing apparel, bed, or other

---

quired, being a mere contract to convey such lands as a security, or, as it has been termed, an equitable mortgage, can have no validity against third persons who acquire legal interests in, or liens upon, the property." Per Gholson, J. Coe *v.* The Columbus, &c., 10 Ohio St. 391. A. purchased a lot of land from B., and took from him a bond of conveyance. He afterwards, and before the payment of any of the purchase-money, mortgaged the land to C., and in the mortgage assigned the bond. This mortgage was recorded. Subsequently B. executed a deed to A., who upon the same day mortgaged to D. for a sum recited in the mortgage as due, "after a fair and equitable settlement of accounts." Held, that A. had an interest in the land, which he could convey by mortgage; that D. could not be treated as an assignee of the vendor's lien, nor deny the recitals in his mortgage-deed, for the purpose of giving him priority over B.'s mortgage, and that the payment of the purchase-money by A. satisfied the lien and let in the mortgage of B. Alderson *v.* Ames, 6 Md. 52. It is held in New Jersey, that a party in possession, under a parol contract to purchase, can mortgage his interest. Sinclair *v.* Armitage, 1 Beasl. 174.

A late case in New Hampshire is illustrative of the general rule with its necessary qualifications. It was there held, that, if an act of the legislature give a railroad corporation authority to issue bonds for a loan, and for security to mortgage to trustees all the property, and all the rights, franchises, powers, and privileges of the corporation, with power, on breach of condition, to sell by a deed which should convey all the rights, &c., which the corporation possessed, and the use of the railroad, with all its property and rights of property, for the same purposes and to the same extent that the corporation could use the same, subject to the same liability as to the use of the road that the corporation would have been under if the deed had not been made; such bonds and mortgage will pass property afterwards acquired

(*e*) As in case of a husband's interest in the homestead of the wife. 4 Allen, 516. See Richardson *v.* Cambridge, 2 Allen, 116.

(*f*) It is said, (2 Story, Eq. § 1021,) a possibility or expectancy, like that of an *heir*, cannot be mortgaged. (Otherwise by the civil law.) Nor the entire succession of an heir, independently of the elements which compose it. This does not fall within the meaning of the term *immovables*, as used in the civil code of Louisiana, Art. 3256. Voorhies *v.* De Blanc, 12 La. Ann. 864. So a right of preëmption and improvements on the public domain are not susceptible of mortgage in Louisiana. Renn *v.* Ott, 12 La. Ann. 233; Gilbert *v.* Penn, Ib. 235. Otherwise in California. Whitney *v.* Buckman, 13 Cal. 536.

necessary articles, beasts of the plough, tools of trade or profession, as the axe of a carpenter or books of a scholar, not being subject to execution or distress, cannot be mortgaged or pawned without delivery of actual possession. Though,

---

by the road, against other creditors who claim by later mortgages. Such a mortgage is, in substance and effect, a conveyance of the road and corporation as an entire thing, and subsequent property becomes part of the original subject by accession, and as incident to the franchise; as in case of a cargo of railroad iron, subject to the claim of the government. And, if an agreement is made by the company with certain individuals that they shall pay the duties, allow the company to lay the iron on their track, and retain a lien on the iron for the money so advanced; the lien, after the iron has been delivered to the road, cannot be asserted against the mortgage to the trustees, unless they had notice of the agreement, and gave their assent, express or implied. But the assent of the trustees would bind the bond-holders. Pierce *v.* Emery, 32 N. H. 484. In the same case, the railroad, before the mortgage to the trustees, owned a cargo of iron, subject to duties, and agreed with the plaintiffs that they might pay the duties; that the railroad might lay the iron; and that the plaintiffs, if the road did not repay them within a specified time, might take up the iron, and hold it for security of the money advanced. Held, the iron having passed into the possession of the road, the lien for the duties was gone, and could not be asserted by the plaintiffs against the mortgage to the trustees. But that the contract was valid between the parties to it, and, if the trustees had notice of, and assented to it, would (in equity) bind the trustees and bond-holders. Ib. See Chew *v.* Barnett, 11 S. & R. 389; Rowan *v.* Sharps', &c., 29 Conn. 282.

While, as in the case last cited, personal property may pass in connection with a mortgage of the realty to which it is incident; on the other hand, the land may be mortgaged by a description which applies literally only to that which is affixed to the land. Mortgage, to secure advances made for the purpose of erecting a building upon land, of "all (the mortgagor's) right, &c., which he now has in the foundation or stonework of said building, and which he may have in and unto said building during its erection and completion and after it is completed." Held, the land passed. Greenwood *v.* Murdock, 9 Gray, 20. The rule, that whatever is fixed to the freehold becomes a part of it, prevails between the mortgagor, who has erected fixtures subsequent to the mortgage, and the mortgagee, as strictly as between vendor and vendee, and the purchaser of the premises at a foreclosure sale will acquire title to the fixtures as a part of the real estate. When fixtures are severed they become personal property, and the owner may sue for the wrongful detention of them. Gardner *v.* Finley, 19 Barb. 317.

if property exempt from execution be mortgaged, and sold under a judgment upon the mortgage debt, the mortgagor cannot maintain trespass against the mortgagee.[1] And if a mortgage include property by law exempt from liability with other property, the mortgage is still valid in part.[2] (*g*) Neither can a pew, it seems, be mortgaged in gross. If appurtenant or annexed to a house, it may be mortgaged with the house, and, if in the chancel, may perhaps be assigned in gross. Nor can a flowing stream of water be the subject of mortgage, being *publici juris;* and an individual can only gain a right to it, by appropriating so much as he requires for a beneficial purpose.[3]

5. With reference to the *parties* to a mortgage, a mortgagee must be one capable of holding real estate; and, it seems, any one thus capable may be a mortgagee. In England, an *alien* may *take* a mortgage, but cannot hold the property against the king. Until *office found*, however, it remains in the mortgagee. If he die before office found, the law will vest the freehold and inheritance in the king. If two be mortgagees jointly, one of whom is an alien, and he die, the other will not hold the whole, but the king will take a moiety; but till office found, the moiety survives. When the king takes the mortgaged premises, the condition is discharged, and he holds absolutely; and it should seem that the estate is also freed from the equity of redemption of the mortgagor in the king's hands. But if the lands are reconveyed before office found, the lien of the crown is gone.[4] In

[1] Frost *v.* Shaw, 3 Ohio, N. S. 270. See Mendenhall *v.* West, &c., 36 Penn. 146, *n.*

[2] McMurray *v.* Connor, 2 Allen, 205; Morrison *v.* Bean, 15 Tex. 257.

[3] 1 Pow. 17, *a* and *n;* Coote, 150.

[4] 1 Pow. 106, and *n.*

(*g*) See Beals *v.* Clark, 13 Gray, 18. In Virginia, a mortgage of property exempt from execution is prohibited. Vir. Code, 500. In Indiana, upon a bill for foreclosure, the defence, that the property was exempt from execution, need not in terms deny that the mortgage was given for the purchase-money of the land. This is proper matter for a reply. Slaughter *v.* Detiney, 10 Ind. 103.

the United States, the law has been very generally changed, so as to allow aliens to hold real estate. Of course, this statutory privilege includes the title by mortgage, and, even independently of such statutory change, it is held that a writ of entry to foreclose a mortgage lies against an alien mortgagor.[1] So an alien is entitled to have a mortgage foreclosed in equity, and the land sold. The demand is regarded as a personal one, the debt being the principal, and the land merely incident.[2] (*h*)

6. A *feme covert* may be a mortgagee. (*i*) It has been said, she cannot be a mortgagor, unless by construction of equity on an agreement that she shall possess separate property. (*j*) But she may make an equitable mortgage of such property, without the concurrence of trustees, unless this be required by the instrument under which she holds

[1] Waugh *v.* Riley, 8 Met. 290. [2] Hughes *v.* Edwards, 9 Wheat. 489.

(*h*) In New Jersey, an act provides specially for an alien's taking a mortgage. N. J. Rev. Sts. 2.

(*i*) A mortgage is held valid, if made by a party competent to execute it under the law of the State in which the land lies, though incompetent by the law of the place of execution; as in case of an infant *feme covert*. Sell *v.* Miller, 11 Ohio St. 331. Whether a wife can have a separate interest in a mortgage, see Cutler *v.* Lincoln, 3 Cush. 125. A. married one of the two daughters of B., a deceased intestate; she afterwards died without issue. A. administered on her estate. Held, he might claim her share of the amount due on a mortgage, given to B. in his lifetime by C., who married the other daughter. Moore *v.* Poland, 1 Halst. Ch. 517. A *feme sole* sells land, taking back a writing which secures a lien on the land. Held, a mortgage, and, upon her marriage, that the husband might release it. Marshal *v.* Lewis, 4 Litt. 140. But, in Pennsylvania, where husband and wife conveyed her land, taking back a mortgage to both, held, under the statute of 1848, he could not validly release the mortgage unless the debt were substantially paid. Trimble *v.* Reis, 37 Penn. 448. A husband may mortgage his interest in the wife's estate. Thus, where land is subject to a right of homestead, a mortgage by the husband alone passes his reversionary right. Smith *v.* Province, 4 Allen, 516.

(*j*) It is held, that in case of a conveyance to a trustee for the use of a wife and her children, she giving her notes for the price, and the trustee a

it. So, if she has a power of appointment, which may be exercised by her notwithstanding her coverture, she may appoint a conditional estate.[1] And in all cases where the wife has a separate estate, however created, or whether or not conveyed to a trustee for her use, she has, in equity, the same power over it, and may bind it by mortgage, without her husband's joining in the deed, as if she were a *feme sole*.[2] Thus a wife may mortgage her separate property for her husband's debts, with a power of sale in case of default, and may reserve the equity of redemption to the husband, who alone can dispose of it.[3] So a husband bought real estate, and directed the deed to be made to another person, in trust for his wife, with a power of appointment to her by writing under seal or by will. The trustee and the wife afterwards executed a mortgage of the real estate, to secure a debt due from the husband, which mortgage was duly acknowledged by the wife. Held, the mortgage was good.[4]

7. So a married woman may bind her separate estate by a mortgage executed jointly with her husband.[5] (*k*)

8. Thus, where a wife joined with her husband in a mortgage of lands, to which she had a title in her own right,

[1] 1 Pow. 106, 107, and *n*. See Tiernan *v*. Poor, 1 Gill & J. 216; Brundige *v*. Poor, 2, 1; Eddleston *v*. Collins, 17 Eng. Law & Eq. 296; Pascal *v*. Sauvinet, 1 La. Ann. 428; Jarvis *v*. Woodruff, 22 Conn. 548; Whitbread *v*. Smith, 23 Eng. Law & Eq. 551; Peabody *v*. Patten, 2 Pick. 517; James *v*. Fisk, 9 S. & M. 144; Bein *v*. Heath, 6 How. 228; Dig. 1848, 214; Fitch *v*. Cotheal, 2 Sandf. Ch. 29; Loomer *v*. Wheelwright, 3 Sandf. Ch. 135; Eaton *v*. George, 42 N. H. 375; Evans *v*. Meylert, 19 Penn. 402; Mallory *v*. Hitchcock, 29 Conn. 127; Brown *v*. Glines, 42 N. H. 160; Gerrish *v*. Mason, 4 Gray, 432; Roarty *v*. Mitchell, 7 Gray, 243; Michener *v*. Cavender, 38 Penn. 334; Hatz's, &c. 40 Penn. 209; Bayler *v*. Com. Ib. 37; Glass *v*. Warwick, Ib. 140.

[2] Firemens, &c. *v*. Bay, 4 Barb. 407.

[3] Demarest *v*. Wynkoop, 3 Johns. Ch. 144.

[4] Robbins *v*. Abrahams, 1 Halst. Ch. 465.

[5] Sessions *v*. Bacon, 23 Miss. (1 Cush.) 272.

---

mortgage to secure them, reciting that they were so made; all the instruments constitute one transaction, in which all the parties joined. Howard *v*. Davis, 6 Tex. 174.

(*k*) A mortgage by husband and wife, of her land, with covenants of warranty by both, estops both to deny her title at the time of the conveyance. Nor can they, in an action upon the mortgage against them, be permitted to

for the consideration that other lands should be conveyed to a trustee for her benefit; the trust so created was held to be supported by a good consideration.[1] So where a married woman, a *cestui que trust*, by the deed of trust is given full power to dispose of the estate after the husband's death, and the same power during his life with his assent; a mortgage executed by both is a good execution of the power.[2]

9. And while it is the prevailing rule in the United States, that the real estate of a married woman may be *absolutely* conveyed by the joint deed of husband and wife; there seems no room to doubt, that it may be validly mortgaged in the same way. And though the statutory law, relating to the rights of married women, neither confer nor recognize the right to mortgage, a wife may still validly join with her husband in a mortgage of her estate, even to secure his debt.[3]

10. If a *feme covert* join her husband in a mortgage, representing her to have a power of appointing in fee, though she had in fact only a separate estate for life, the mortgagee may still enforce his security against her life-estate.[4]

[1] Hunt *v.* Dupuy, 11 B. Mon. 282.
[2] Campbell *v.* Low, 9 Barb. 585.
[3] Eaton *v.* Nason, 47 Maine, 132.
[4] Coote, 154.

---

show, that after the commencement of such action she acquired a new title, under which they hold possession. The doctrine of *rebutter*, to avoid circuity of action, is not admissible in such cases. Nash *v.* Spofford, 10 Met. 192.

A house, subject to mortgage, was conveyed by warranty deed, in trust for a married woman, with the consent of her husband, and paid for with money which was hers before marriage. The husband and wife took possession. The wife afterwards procured a divorce *à mensa*, and the grantee conveyed the house to her. Before the divorce the husband took an assignment of the mortgage, entered legally for foreclosure, and then transferred the mortgage to the plaintiff, who brings this action (of forcible detainer) against the wife. Held, the assignment of the mortgage to the husband was not fraudulent as to the wife or the mortgagor; that the plaintiff had the legal title, and was entitled to judgment for possession. Howard *v.* Howard, 3 Met. 548.

11. Upon a mortgage jointly executed by husband and wife, a *scire facias* is properly brought against both.[1] And, it seems, the wife must be made a party, to bar her dower.[2]

12. In case of money lent by the wife from her separate estate, on mortgage; the mortgage security will follow the nature of the money represented by it, and the wife will have similar rights over it.[3]

13. Where the husband borrows money on the security of the wife's estate, the money being under his control, it is supposed to come to his use, and the burden is on him to prove otherwise. Parol evidence is admissible.[4] If the loan is for his benefit, and is paid from her estate, she or her heir will stand as creditor of his estate to that amount, in place of the mortgagee; and will have preference of his legatees, though not of his creditors.[5] If the money be raised by the husband to pay off debts of the wife incurred *dum sola*, her estate must bear the burden.[6]

14. Parol evidence is admissible, that the wife or her heir, after the death of the husband, promised to relinquish their claim. But not, it seems, of a declaration by the wife, that the money was intended by her as a gift to the husband, contrary to the express language of the deed.[7]

15. The claim of the wife will not be waived by her covenant after the husband's death, that the estate shall stand charged with the original debt, and with a further sum advanced to her.[8]

16. If a wife's estate is subject to mortgage, the husband and wife are not bound to keep down the interest for the benefit of her heir; and, therefore, the amount of interest due at her death should be added to the principal, and the husband, as tenant by the curtesy, should keep down the

[1] Gilbert *v.* Maggord, 1 Scam. 471.
[2] Ibid.
[3] Coote, 154.
[4] Kinnoul *v.* Money, 3 Swanst. 208, *n.*; Clinton *v.* Hooper, 1 Ves. jr. 173.
[5] Coote, 559. See Lancaster *v.* Evors, 4 Beav. 158.
[6] Lewis *v.* Nangle, Amb. 150.
[7] Coote, 559.
[8] Ibid.

interest of the aggregate sum during his life. But he cannot claim for interest paid by him during the life of the wife.[1]

17. A wife joined with her husband, in a mortgage on their separate estates, to secure his debt. Afterwards he sold his own property, and the purchaser received a deed from both, and paid him a sum supposed to be sufficient to pay the mortgage which bound both estates, but which, in fact, was not sufficient. The Court directed the balance due on the mortgage to be paid out of the proceeds of the sale of her real estate. Held, she was entitled to recover from the purchasers of his estate the amount of such balance.[2]

18. Previously to a marriage then in contemplation, the intended husband, by his agent, paid off two equitable mortgage debts of the intended wife, secured by a deposit of title deeds belonging to her. He did this, apparently, to save the expense of a legal mortgage, which would otherwise have been required by the mortgagees. The title deeds still remained in their custody. The marriage was solemnized, and there was no settlement, or agreement for one. There was no issue, the husband died before the wife, intestate, and she took out administration. Held, he did not intend to make a gift to her of the money which he had paid for her, and that the debt still existed on the security of the equitable mortgage in favor of his personal estate.[3]

19. The law carefully protects the wife's right of redeeming her estate. Thus, upon a bill in equity by husband and wife to redeem land mortgaged by them, the defendant produced a paper, found among the papers of a deceased subscribing witness, signed and sealed by the mortgagee and the husband, and reciting that the mortgagee had taken possession to foreclose, and leased to the husband for a certain rent. Held, the mortgage was not foreclosed. The Court say, "It was the wife's estate, and there is no evidence that she consented to or had knowledge of the sup-

[1] Ruscombe *v.* Hare, 2 Bligh, N. S. 192.

[2] Sheidle *v.* Weishlee, 4 Harris, 134.

[3] Gooch *v.* Gooch, 8 Eng. Law & Eq. 141.

posed entry. In equity, she would be let in to redeem, care being taken that the right of the husband should be transferred to the mortgagee. There is no evidence of an entry or actual possession by the mortgagee. It does not appear whether this paper is an *escrow* or not. It can be evidence only by way of estoppel to the husband, and does not bind the wife. The transaction must be considered as an attempt to create a foreclosure privately, and without the knowledge of the wife. On that ground it is bad in equity; and it is bad in law for want of evidence of a delivery of the paper."[1] So, upon a mortgage by husband and wife of her land, the equity of redemption was sold on an execution against him. After his death, she brings a bill in equity to redeem against the execution purchaser, who had also taken an assignment of the mortgage, and entered under a writ of possession. Held, she might redeem on payment of the mortgage debt only. Wilde, J., says, "If a widow be dowable of an equity, she is entitled to redeem; and if she has this right in the estate of her husband, it would be a strange anomaly if she had not as much right in her own inheritance. The equity is inherent in the land, and as the estate was held before the mortgage, so is the equity after. If there is a legal performance of the condition, the estate revests without the aid of a court of equity; and if there is an equitable performance, the court will decree a restoration of the estate; and in neither case does the husband acquire any new right; nor can a creditor of the husband, by attaching, &c., acquire any greater right than the husband had before the sale." He proceeds to remark, that even the English doctrine of *tacking* would not apply to the case of husband and wife.[2] (*l*)

[1] Hadley *v.* Houghton, 7 Pick. 29.

[2] Peabody *v.* Patten, 2 Pick. 517, 519, 520.

(*l*) It is held in New Jersey, that a mortgage made by the husband will not be postponed to a subsequent joint mortgage because the wife did not join in the former. Hinchman *v.* Stiles, 1 Stockt. 361.

20. An *infant* may be a mortgagee. Whether he is the original grantee, or takes by descent, he is bound by the conditions of the deed. The mortgage must be good in the whole or void in the whole.[1]

21. The mortgage of an infant is not void, but only voidable. Hence, where an infant mortgaged his land, and after coming of age made an absolute conveyance of it, recognizing, and subject to, the mortgage; the latter deed was held to be a confirmation of the former one, and the mortgagee recovered judgment for the land against the second grantee.[2] (*m*)

22. If an estate descend to an infant subject to incumbrances, the guardian, without direction of the court of equity, may apply the profits to discharge them; namely, to pay the interest of any real incumbrance, and the principal of a mortgage, because that is a direct and immediate charge upon the land; but not the principal of any other real incumbrance.[3]

23. A *joint tenant* may mortgage his undivided interest. So a tenant in common, or partner. (*n*) The mortgage will

[1] Parker *v.* Lincoln, 12 Mass. 17, 18.

[2] President, &c. *v.* Chamberlin, 15 Mass. 220. See Loomer *v.* Wheelwright, 3 Sandf. Chan. 135.

[3] 1 Pow. 284, *a*.

(*m*) A minor entered into copartnership with a person of full age, bringing money into the concern. During his minority, the partnership was dissolved; the minor sold out to the other partner, who received and retained exclusive possession of the property, and afterwards mortgaged it to the minor to secure a note given in consideration of the sale. The mortgagor afterwards becoming insolvent, the mortgagee made application to the master in chancery for a sale of the property under the statute. Held, the application should be granted. Shaw, Ch. J., says: "The validity of the sale to the insolvent did not depend wholly upon his (the minor's) ability and legal capacity to execute a bill of sale under seal; but it took effect from the delivery of the goods, and his title thereto has never been drawn in question. None of the contracts and stipulations entered into by him have been avoided on the ground of infancy; and neither the insolvent nor his creditors have reason to complain of the plaintiff on that score." Barnard *v.* Eaton, 2 Cush. 294, 302.

(*n*) The following case illustrates the rights of partners and their joint

operate as a severance of the joint tenancy, if in fee; if for years, a severance *pro tanto*.[1]

[1] 1 Pow. 18, and *n*.

---

creditors, in case of a mortgage made by one of them for his private debt. Two partners took a lease of a building and water-power, and put machinery into the building for the purpose of carrying on their joint business. One of them afterwards mortgaged his interest for his private debt, but the partners remained in possession and use of the property. A bill was subsequently filed for foreclosure of the mortgage, and a sale of the mortgagor's interest, to which the lessor was made party, the firm being indebted to him for rent. Held, the mortgagee could claim only what remained of the mortgagor's interest, after paying the firm debts, the rent included. Receivers, &c. *v.* Godwin, 1 Halst. Cha. 334. See Mosely *v.* Garrett, J. J. Mar. 212.

A. and B., partners and tenants in common of lands, dissolved their partnership, agreeing that B. should take all the partnership property, including the lands, and pay the debts. A. conveyed his share to B., but the deed was not recorded in the town where a part of the lands was situated. B. mortgaged to A. all the partnership lands, to secure him against liability for debts of the firm, and also mortgaged the part above mentioned to C. to secure a debt due him from the firm, specified in B.'s mortgage to A. A. and B. afterwards conveyed the said part to a stranger. Held, that the stranger might hold A.'s moiety against C., but that C. was entitled to a decree of foreclosure on the other moiety, as against A. and B., notwithstanding the prior mortgage from B. to A. Frothingham *v.* Shephard, 1 Aik. 65.

Where a partner gives a mortgage upon his separate property, to secure a partnership debt, he thereby becomes a surety for the firm, and is entitled to the rights and privileges of that character; and his separate creditors succeed thereto, and have a right to insist that the partnership property be first applied towards the debt, before resort is had to the separate estate of the surety; and if the latter is first applied, his separate creditors will be entitled to be subrogated to the rights of the creditor as against the partnership fund. Averill *v.* Loucks, 6 Barb. 470.

By the articles of copartnership of a private banking association, each partner was to give a mortgage to the partnership, to secure the payment of his stock. Mortgages were executed, and recited, that they were to secure the bonds for the payment of the stock in five, ten, and fifteen years, and for the purpose of "binding and rendering himself liable to pay the" partnership debts; and in the condition of the mortgages it was recited, that the mortgage should be discharged when the liabilities of the partnership were all paid. Held, one of the objects of the mortgages was to secure the debts

24. Where land is held in common, a mortgage from one owner, for his proportion of a debt secured by mortgage of the whole, is a continuation of the original lien.[1]

25. One taking a mortgage from a tenant in common is not bound by a partition, between the latter and the other tenants, upon the petition of such other tenants, to which the mortgagee was not made party, unless he confirms the partition. The mortgagor, in such case, being allowed to remain in possession by the mortgagee, may occupy either in common with the co-tenants or in severalty. Hence, notwithstanding his sole occupation, the mortgagee may maintain a petition for partition, not being disseized thereby.[2]

26. Where, pending proceedings for partition, a tenant in common mortgages his undivided share, and there is an actual partition, the mortgage will attach to the portion set off to him.[3] And if, instead of partition, the premises are sold, and a part of them purchased by the mortgagor, who is to pay a certain amount to the other tenants, the mortgage will attach as a lien to the land so purchased.[4] If the mortgagor have a larger interest than was covered by the mortgage, and the whole be set off together in severalty, the lien of the mortgagee will attach, as tenant in common,

[1] Lee *v.* Porter, 5 Johns. Ch. 268. See Roswell *v.* Simonton, 2 Cart. 516.
[2] Colton *v.* Smith, 11 Pick. 311.
[3] Westervelt *v.* Haff, 2 Sandf. Ch. 98.
98; Jackson *v.* Pierce, 10 Johns. 414.
[4] Westervelt *v.* Haff, 2 Sandf. Ch.

---

of the partnership, and a creditor of the partnership, holding a mortgage, might foreclose the same on account of such partnership indebtedness, although the first instalment on the bond for the payment of his stock by the mortgagor had not become due. Boisgerard *v.* Wall, 1 S. & M. Ch. 404.

Upon a dissolution of partnership between A. and B., A. agreed to pay a partnership debt, secured by mortgage of B.'s land. B. afterwards mortgaged the land to C. Held, C. became entitled to the benefit of B.'s equity, to compel A. to discharge the prior mortgage. Kinney *v.* McCullough, 1 Sandf. Ch. 370.

to the whole land set off, in the proportion that the quantity mortgaged bears to the whole land set off.[1] (*o*)

27. It has already been stated, that a mortgage is a deed made upon a condition, which condition appears by the deed itself. It was the early doctrine of the law, that, if the defeasance or condition was contained in a deed executed after the feoffment, it came too late; because, livery of seisin or corporal tradition being necessary at common law to all conveyances of land, no mortgage thereof was valid, unless possession also was delivered to the mortgagee, and the livery *coram paribus* in such case attesting an infeudation, in which there was no condition, the tenant must hold the land according to that investiture.[2] (*p*)

28. At common law, a distinction was made between a mortgage made to secure a sum of money as a mere gift, and one made to secure a previous debt. In the former case, a tender within the time discharged the estate, and gave the

[1] Randell *v.* Mallett, 2 Shepl. 51.

[2] 1 Pow. 5.

(*o*) In reference to the rights and liabilities of joint mortgagors in contributing to pay the mortgage debt, see ch. 11, s. 56, n. With regard to the mortgages of *corporations;* in Pennsylvania, by a late act, the Supreme Court have all the jurisdiction of a court of chancery, in all cases of mortgages given by corporations. Laws of Pa. 1862, p. 477.

As to the acknowledgment or attestation of mortgages by persons interested in the party corporation, see Laws of Connecticut, 1856, p. 86.

In Indiana, purchasers of railroads, plank roads, turnpike roads, or McAdamized roads, under foreclosure of mortgages executed by companies, owners of such roads, shall become owners thereof, if within three months they organize under the original charter. A statement of such organization, &c. shall be filed for record in the office of the recorder of each county through or into which said road extends. Such statement to be evidence of the organization of said company. Acts of Ind. 1859, p. 152.

(*p*) By the feudal law, the mortgage, as well as absolute alienation of land, required the consent of the lord. Glanville says, — "Nulli liceat feudum vendere vel pignorare sine permissione iliius domini." The maxim of the feudal law was, — "Feudalia, invito domino, aut agnatis, non recte subjiciuntur hypothecæ, quamvis fructus posse esse, receptum est." Feud. lib. 2, tit. 55; Bac. Abr. *Mortgage*, A.

mortgagor a right of entry, and the mortgagee, having no further lien upon the land, nor any personal right of action, was left without remedy for his money. But in the latter case, though such tender discharged the land, yet the debt remained, and might be recovered by action; for it was a duty, distinct from the condition, and therefore not lost by the tender and refusal.[1]

29. In the performance of conditions, a distinction is made between those which are to *create*, and those which are to *destroy*, an estate; for the former may be performed, by construction of law, as near the condition as may be, according to the intent; but the latter are to be strictly construed, unless in special cases. The conditions of mortgages were classed under the former of these heads; for though, by performance, the estate was to be divested out of the mortgagee, yet it was with intent to reinstate the mortgagor in his inheritance.[2]

30. The doctrine, as to tender of performance of the condition of a mortgage, is stated by the Court in New Hampshire as follows; showing that the ancient law was as rigid in protecting the rights of the mortgagor, where he was guilty of no neglect, as in decreeing an absolute forfeiture of his estate, for the slightest non-compliance with the condition of the mortgage.

31. "At common law, when lands were granted upon condition that the conveyance should be void upon the payment of a certain sum at a particular time by the grantor; if he paid the money, or made a legal tender of it, at the day, he immediately acquired a right of entry, and the land was forever discharged from the incumbrance.[3] Coke, in his commentary upon this section of Littleton, says, that 'this is to be understood, that he that ought to tender the money is of this discharged forever to make any other tender; but if it were a duty before, though the feoffer enter by force of the

[1] 1 Pow. 5, 6; Co. Lit. 219, *b*; Coote, 47.

[2] 1 Pow. 6; Co. Lit. 219, *b*; 205, *a*; 206, *a*; 213, *a*; 221, *b*; Wyatt's case, Cro. Car. 427.

[3] Lit. 338.

condition, yet the debt or duty remaineth;' 'as if A. borrowed of B. £100, and after mortgageth land to B. upon condition for payment thereof, if A. tender the money to B. and B. refuseth it, A. may enter into the land, and the land is freed forever of the condition, but yet the debt remaineth and may be recovered by action of debt.' And the law is without doubt the same here at this day. If the condition of a mortgage is performed at the day, or if a legal tender is made and refused, the land is forever discharged from the incumbrance. And at common law, if the mortgagor neglected to pay at the day, the estate of the mortgagee became absolute, and the land was gone forever." [1] (*q*)

32. If time and place of payment were fixed, tender must be made accordingly; if no place were fixed, the money being a sum in gross, and collateral to the title of the land, the mortgagor was bound to seek the mortgagee and tender the money personally, if within the realm, and it was not sufficient to tender it on the land. If a place were named, it seems, a notice of readiness there would be sufficient. So, attendance at the mortgagee's house, in case of previous notice. If no time were appointed, the mortgagor had his

[1] Per Richardson, Ch. J. Swett *v.* Horn, 1 N. H. 332, 333. Darling *v.* Chapman, 14 Mass. 104; Hill *v.* Robertson, 24 Miss. 368; Blanchard *v.* Kenton, 4 Bibb. 451; King *v.* The State, &c. 7 Cush. 7. See Merritt *v.* Lambert, 7 Paige, 344.

(*q*) "But if the money is not paid by the day, the condition on which the land was to revert to the mortgagor has not been complied with, and the interest of the mortgagor in the land is then reduced to a mere equity of redemption; and an actual payment, not a mere tender, then becomes necessary to discharge the legal and equitable lien of the mortgagee upon the land." 1 N. H. 333. In New York, it has been held, that the lien of a mortgage will be extinguished by a tender *before foreclosure;* and the mortgagee, if in possession, may be ejected therefrom. But the mortgagor must pay costs, if the tender was not made till after the day fixed for payment. Edwards *v.* Ins. Co., 21 Wend. 467; 26 Ibid. 541; Arnot *v.* Post, 6 Hill, 65. But in Maine, a tender of the amount of a note secured by mortgage, made long after the maturity of the note, does not discharge the mortgage. Smith *v.* Kelley, 27 Maine, 237. See Ritger *v.* Parker, 8 Cush. 149. Also ch. 17.

whole life for payment of the money, but his heirs could not pay it, unless expressly mentioned. If a time were fixed, though the condition mentioned only the mortgagor himself, his heir, executor, administrator, or the guardian of the heir, might tender the money and save the condition. If the words of the condition were for payment to the feoffee or his heirs, the money could not be paid to the executor or assigns; if to "heirs or assigns," and the mortgage was transferred, it might be paid either to the first or second feoffee; or, if the first feoffee was dead, to his heirs, but not his executors; if to "heirs, executors, or assigns," it might be paid to either.[1]

33. If an account was stated between the parties, and the balance paid, or a new security taken by bond or statute, it was a good performance. If the mortgagee, before any transfer, received the money, and returned the whole or a part, this was a good performance; but if the condition was for payment to the feoffee, his heirs or assigns, and the feoffee transferred the mortgage and died, and the mortgagor paid the money to the heir of the first mortgagee, who returned a part of it; this was held not sufficent to divest the title of the assignee.[2]

34. Substantially the same principles, relating to the effect of the breach of condition in a mortgage, are still in force, so far as the jurisdiction of *courts of law* is concerned. Thus, it has been stated in Massachusetts, that a mortgage, although a pledge at first, becomes an absolute interest, unless redeemed at the time limited for the payment of the money, or other performance of the condition. If it be not literally performed, by payment of the money at the day, the estate becomes subject to the dower of the wife of the mortgagee, and to all other incumbrances by him; although the money should be afterwards paid, and the estate reconveyed to the mortgagor.[3]

[1] Coote, 45, 513.

[2] Coote, 47. See Harmer *v.* Priestley, 21 Eng. Law & Eq. 496.

[3] Per Wilde, J. Parsons *v.* Welles, 17 Mass. 421; Pow. on Mort. 9, 10. See Montgomery *v.* Bruere, 1 South. 267; Lull *v.* Matthews, 19 Verm. 322.

35. Upon these principles, as has been stated, the wife of a mortgagee in fee of a forfeited mortgage is entitled to dower.[1] But if she were to prosecute her claim, a court of equity would undoubtedly interpose and saddle her with all the expenses.[2] But it has been held, that there is no curtesy to the husband of a mortgagee, unless there has been a foreclosure, or redemption is barred by lapse of time.[3]

36. Mr. Coventry, the learned annotator of Powell on Mortgages, remarks,[4] that many modern conveyancers have substituted for the usual *condition* of a mortgage, an agreement by the mortgagee to *reconvey*, on payment of the debt. (*r*) It makes no difference that there is a prior mortgage.[5] And such agreement, as well as a condition, may be contained in a separate instrument from the conveyance. Thus a conveyance by a deed absolute upon its face, to secure a debt due from another person, and an agreement by the creditor, to convey to the debtor, upon payment of the debt, were held to constitute a mortgage.[6] The advantage of a condition is said to be, that, upon performance of it, the estate *ipso facto* revests in the mortgagor, without the necessity, as in the other case, of a reconveyance; while it is also attended with the disadvantage, that, in case of an assignment of the mortgage, payment to the mortgagee himself might revest the title in the mortgagor, and thus a wrong be done to the assignee.[7] It is remarked, however, that this inconvenience is rather imaginary than real, because no debtor would be likely to pay a mortgage without having it delivered up to

[1] Hard. 466; Co. Lit. 221, *a*.
[2] Nash *v.* Preston, Cro. Car. 190; Noel *v.* Jevon, 2 Freem. 43; Bevant *v.* Pope, ib. 71. See *infra*; *Dower in Equities of Redemption*.
[3] Casborn *v.* Inglish, 7 Vin. 157.
[4] 1 Pow. 9, *n.* H. See Charles *v.* Claggett, 3 Md. 82; Cross *v.* Hepner, 7 Ind. 359; Murphy *v.* Cilley, 1 Allen, 109; Woodward *v.* Pickett, 8 Gray, 617.
[5] Woodward *v.* Pickett, 8 Gray, 617.
[6] Weed *v.* Stevenson, 1 Clark, 166.
[7] 1 Pow. 9, *n.* H.

(*r*) But a conveyance, with a bond given back to reconvey on *failure of payment*, vests the whole legal and equitable title in the grantee till such reconveyance. Speakman *v.* Speakman, 4 Ind. 420.

him.[1] It is further said, that a condition for a reconveyance can be fulfilled only by such reconveyance.[2]

37. The precise form in which the condition is expressed, or the name given to the transaction by the parties, is immaterial, more especially in equity, provided the substance and intent distinctly appear. "Artificial words do not alter the nature of it."[3] Thus a condition, that the conveyance shall be void in a certain event, is not absolutely necessary to a mortgage.[4] So a deed containing the following clause, — "Provided the grantor shall pay off certain legacies bequeathed by the last will of J., which legacies are a charge upon the land herein described, then these presents shall cease;" was held a mortgage.[5] So an absolute deed, with an accompanying agreement, that the lender of the money thus secured shall receive the rents and profits till the debt is due, and reconvey on payment.[6] So a deed, made in terms to secure certain debts recited therein, is a mortgage.[7] (*s*) "Or a conveyance by a judgment-debtor to a

[1] See Prest. Conv. 200.
[2] Coote, 48.
[3] Com. Dig. Chancery, 4, A 2.
[4] Steel *v.* Steel, 4 Allen, 417.
[5] Stewart *v.* Hutchins, 6 Hill, 143.
[6] Cross *v.* Hepner, 7 Ind. 359.
[7] Skinner *v.* Cox, 4 Dev. 59; Baldwin *v.* Jenkins, 23 Miss. 206; Cotter-

(*s*) But, as to the distinction between a *deed of trust* for security or payment of debts, with a power of sale, and a *conditional deed* or mortgage, see *Power of Sale;* Best *v.* Carter, 19 Eng. Law & Eq. 56; Bennett *v.* Union, &c. 5 Humph. 612; Beckley *v.* Munson, 22 Conn. 299. As to the distinction between a mortgage and a mere executory contract, see Coles *v.* Perry, 7 Tex. 109. Conveyance by A. to B. by absolute deed. B. gave back a written contract, promising to sell the land at a certain time, pay two notes with the proceeds, and the balance to A. Held, that B. held the land in trust, and it was his duty to make sale at the time specified, and appropriate the proceeds in the manner stated; that C., who was a surety on one of the notes, although he might not have known of the trust when it was undertaken, was yet entitled to enforce its execution, when he was informed of it, if it had been previously annulled; and that, if there was a mortgage upon the estate not mentioned in the contract, but known to B. at the time of its execution, he might pay it off, and deduct the amount from the proceeds of the sale. Pratt *v.* Thornton, 28 Maine, 355.

trustee, authorizing him, if the judgment were not paid in a certain time, to sell the land.[1] Or a covenant, by a debtor, to execute to the creditor a mortgage upon the debtor's share under his father's will, whenever a division should be made.[2] So A., a debtor, conveyed in fee to B., the creditor, taking back a written promise to reconvey, provided A. should pay B. a certain sum on a certain day, with interest for the previous year, and all other claims. A. continued in possession. The payment not being made, B. leased to A. for a year, and afterwards for another year. A.'s right in the land being sold on execution to C.; held, C. might redeem from B.[3] And it is held that the agreement to reconvey may be made with a third person. Thus A. conveyed to the defendant, who gave to the plaintiff a writing, which recited that he "had a deed for (the plaintiff's) land," for which he had paid the purchase-money, and promised to convey to the plaintiff for her repaying the purchase-money within two years. It appeared, otherwise, that the land was conveyed as security for a debt. Held, the time fixed was not of the essence of the contract, and the plaintiff might claim a reconveyance and an account, on payment of the debt.[4] More especially, where the deed is made by husband and wife, the bond may be given to the wife alone.[5] So the defendant, being indebted to the wife of the plaintiff, executed to the plaintiff a deed in fee of certain lands; and the plaintiff, by a separate instrument, after reciting the conveyance, agreed, that, if the land should sell for more than enough to pay off certain incumbrances, and the consideration mentioned in the deed — which was the amount of the plaintiff's debt — and the trouble the plaintiff should be put to; he would pay back to the defendant all the overplus. Held, the two instruments together constituted a mortgage. Savage, Ch. J., said: — "It is true, there was no right of redemption of the land itself

ell *v.* Long, 20 Ohio, 464; Robinson *v.* Farrelly, 16 Ala. 472; Rogan *v.* Walker, 2 Chand. (Wis.) 133; Woodworth *v.* Guzman, 1 Cal. 203; Chowning *v.* Cox, 1 Rand. 306.

[1] Comstock *v.* Stewart, Walk. Ch. 110.
[2] Lynch *v.* Utica, &c. 18 Wend. 236.
[3] Kintner *v.* Blair, 4 Halst. Ch. 485.
[4] Mason *v.* Hearne, 1 Busb. Eq. 88.
[5] Mills *v.* Darling, 43 Maine, 465.

that was to be sold; but the avails were to belong to the grantor, after paying all incumbrances and expenses." He added, that the agreement to return the overplus money "clearly shows that it was not the intention of the grantor to part with any more of his interest in the premises conveyed, than sufficient to satisfy the mortgages, and the amount due the plaintiff."[1] (*t*) So one who takes a deed of land to himself, to secure the purchase-money, for which he becomes liable on account of the purchaser, is a mortgagee.[2] So, a year after the date of a deed, the grantee gave a bond, reciting that the deed was made to secure a loan, and conditioned to convey on payment on a certain day. Held, a mortgage.[3] So A. sells and conveys to B., agreeing to hold and use the property till B. shall sell, and then to give it up in as good repair as when purchased, upon payment of a balance of the purchase-money. Held, A. hereby became a mortgagee, and might foreclose upon non-payment in reasonable time.[4]

38. To avoid the inconvenience and injustice to which the

[1] Palmer *v.* Gurnsey, 7 Wend. 248.
[2] Pattison *v.* Horn, 1 Grant's Cas. (Penn.) 301.
[3] Montgomery *v.* Chadwick, 7 Clarke, (Iowa,) 114.
[4] Gibson *v.* Eller, 13 Ind. 124.

(*t*) In Cooper *v.* Whitney, 3 Hill, 95, Morse, being indebted in the amount of the three mortgages to St. John, Luquire, and Burlew, conveyed in fee to Burlew, who, by a separate instrument executed at the same time, agreed, that, if he could sell the premises within a reasonable time for more than enough to satisfy the three debts and his expenses, he would pay the excess to Morse. It was held, that, although the transaction was not in the most usual form of a mortgage, it had all the essential qualities of a mortgage, except the absence of an express condition, that the deed should become void on payment of the debts which it was made to secure; that, without such condition, Morse might not perhaps be allowed to redeem, and that there was some difficulty in treating the conveyance as a technical mortgage, it being rather a trust; but the case turned on other points, and this question remained undecided. A deed which provided, that, if the grantor can within a certain time "dispose of the land conveyed to better advantage," he may do so, paying the grantee the "consideration-money" mentioned in the deed, was held not to be a mortgage. Stratton *v.* Sabin, 9 Ham. 28.

mortgagor might be exposed by an absolute forfeiture, it has been usual in England to substitute mortgages for a long term of years for mortgages in fee. (*u*) And this practice pre-

---

(*u*) Mr. Coote says, in some instances the mortgage used to be effected by a *demise and redemise;* that is, the mortgagor demised the land to the mortgagee for a long term of years at a peppercorn rent, and then the mortgagee redemised them at a pecuniary rent, which covered the interest of the money lent; and there was a condition in the original demise, that, on payment of the mortgage debt and interest by a given day, the original term should be at an end; upon which the derivative term would also cease. Coote, 156, 157.

A mortgage had been made for the term of five hundred years, containing a covenant by the mortgagor to convey the fee when required. Claim, for foreclosure of the equity of redemption, and to have the freehold reversion and inheritance conveyed to the mortgagor. The registrar had refused to file the claim without leave. Leave given. Phipps *v.* Budd, 2 Eng. Law & Eq. 137. See Propert's, &c. 19, 604.

There may also be a mortgage of a leasehold interest itself. In Missouri, mortgages of leaseholds for more than twenty years are treated like mortgages of estates in fee. Misso. St. 410. In Arkansas, the mortgagee of a leasehold may obtain possession of the premises after the lessee has been ejected, by payment of the debt. Ark. L. 680.

Where an assignee of a term of years, having no other right or interest in the lands demised, mortgages such lands, without reciting the lease, the term of years passes to the mortgagee, and a purchaser at a sale under a foreclosure of the mortgage becomes the assignee of the lease. Kearney *v.* Post, 1 Sandf. 105.

Mortgage for a term of years, in 1822, of land leased to the mortgagor in 1821. In 1834, the mortgage was paid off, and the mortgagee and the owner of the equity conveyed all their interest to the party under whom the plaintiff claims. Held, the plaintiff was a person claiming under a mortgage within St. 7 Wm. 4, and 1 Vict. c. 28, and therefore might bring ejectment within twenty years after the payment, though no rent had been paid the mortgagor within twenty years, nor his title acknowledged by the tenant in possession. Budeley *v.* Massey, 6 Eng. Law & Eq. 356.

Where a mortgage of leasehold premises reserves a right to the mortgagor to retain possession till breach of condition, and he holds over, the law will not imply an assumpsit to pay rent to the mortgagee during the time of holding over, and previous to an entry by the mortgagee. If after breach of condition the mortgagor tenders performance, and the mortgagee brings assumpsit for rent alleged to have accrued during the holding over, the title

vailed very generally, until the courts of equity interfered for the redemption of mortgages in fee, upon the principles hereafter stated.

39. Although the legal estate is absolute at law in the mortgagee after forfeiture, yet the courts of equity, after their jurisdiction became well established in England, without any legislative enactment, thought that conscience and equity required them to break in upon the common law, and to grant relief by permitting the mortgagor at any reasonable time to redeem. They held that the power of redemption was an equitable right, inherent in the land, and binding all persons, whether claiming in the *per*, that is, by the act of the mortgagee, as tenant in dower, by *statute staple*, *elegit*, &c.; or in the *post*, that is, by the act of the law, as tenant by the curtesy, and the lord by escheat,[1] Chancery viewed the condition of a mortgage as a *penalty*, or *forfeiture*, against which equity ought to relieve; (*v*) even though the deed

[1] Parsons *v.* Welles, 17 Mass. 422, 423; Wilkins *v.* French, 20 Maine, 116.

---

to the premises cannot be tried in this action; and if a third person, by permission of the mortgagor, entered and occupied before, and retained possession after, condition broken; the mortgagee, who had never entered, cannot maintain trespass *quare clausum* against him. Mayo *v.* Fletcher, 14 Pick. 525. See Smith *v.* Blaisdell, 17 Verm. 199; Johnson *v.* Dopkins, 3 Cal. 391. In Ohio, a mortgagor, who was a tenant in possession of a leasehold estate for the term of ten years, — the instrument under which he held possession not being witnessed or acknowledged, — has such an estate as requires a mortgage of it to be executed in conformity with the act of Feb. 22, 1831. Paine *v.* Mason, 7 Ohio, (N. S.) 198. A mortgage of a leasehold estate described by metes and bounds is only an assignment of the rents, and, as a mortgage, in Vermont, does not confer a power of sale, only the annual rent could be received by the mortgagee, and his debt might be enforced upon the other securities in the mortgage. Hulet *v.* Soullard, 26 Vt. 295. In California, a lease, recorded as such, with a stipulation that the building erected by the lessee "is mortgaged as security" for rent, is a valid mortgage. Barroilhet *v.* Battelle, 7 Cal. 450.

(*v*) The jurisdiction of equity in case of mortgages has also been ascribed to the head of *accident;* but more properly, perhaps, to that of *trust*, arising from the nature of the contract, *as a security*. 2 Story, Eq. § 1014, n. "A

expressly declared, that, unless the debt were paid by a certain day, the estate of the mortgagee should be absolute.[1]

40. Mr. Powell[2] says: — "When the stern and rigid severities of that (the feudal) tenure yielded to the importunities of a more refined age, and the benefits of commerce were found to keep pace with the extension of a free alienation, the courts of equity moulded contracts respecting real property into the shape most convenient for the purposes of society. In adjusting the various rules respecting it, many contests arose between the courts of Law and Equity; the former ever displaying a strong inclination to adhere to the old rigids maxims introduced for the purpose of preserving real property unalienable, whilst the latter were disposed to

[1] 2 Greenl. Cruise, 78; Chapman *v.* Turner, 1 Call, 252; Sampson *v.* Pattison, 1 Hare, 536.

[2] 1 Pow. 108.

---

mortgage is in many respects a creature of equity." Penniman *v.* Hollis, 13 Mass. 431. "Courts of equity have raised up a system of their own upon the subject of mortgages, in derogation of the doctrines of the common law." Montgomery *v.* Bruere, 1 South. 267. Notwithstanding the peculiar favor with which the rights of *mortgagors* are regarded by courts of equity, those of *mortgagees* are also protected, so far as the claims of justice and good faith demand. Thus, where a defendant in a foreclosure suit prayed for indulgence, on the ground that, for a part of the time, since a master's report had been made in the case, he had been in prison, and the rest of the time forced to leave the kingdom; the Lord Chancellor said: "This is thrown in to move compassion; for all persons in the defendant's case, who are incumbered, are liable to such accidents; and if I was to give any weight to it, a creditor would lie under very great hardships, and the saying inverted, for a lender would then become a slave to the borrower." Gould *v.* Tancred, 2 Atk. 534. In reference to the somewhat undefined powers and duties of courts of law and equity, with regard to mortgages, Judge Story remarks: "A judge at law sometimes deals with it in its most enlarged and liberal character, stripped of its technical and legal habiliments; and a judge in equity is sometimes obliged, in the administration of his duties, to follow out the doctrine of law, and to contemplate it with much of its original and ancient strictness." Gray *v.* Jenks, 3 Mas. 521, 522. Where a mortgage has been recovered upon at law, though there be a defect in its execution, the defect will not be regarded in equity. Dust *v.* Conrod, 5 Munf. 411.

consider the essential nature of contracts, and to give them operation according to the intention of the parties stipulating. In the end they prevailed, and an equitable jurisdiction was gradually introduced, which, by correcting without enfeebling the severe rules of the Common Law, laid the foundation of a system of jurisprudence, admirably adapted to the free enjoyment of property." (*w*)

41. Chancellor Kent remarks: — " The case of mortgages is one of the most splendid instances in the history of our jurisprudence, of the triumph of equitable principles over technical rules, and of the homage which those principles have received by their adoption in the courts of law."[1] And Judge Story truly says,[2] the doctrines of equity are " founded upon principles of justice so universal, as equally to commend themselves to the approbation of a Roman prætor, and of a modern judge, administering the law of Continental Europe, *ex æquo et bono*."

42. Courts of equity, however, allowed the mortgagee to call upon the mortgagor to redeem *presently*, or in default thereof to be forever foreclosed. And they generally refused to interfere in favor of the mortgagor, after twenty years' possession by the mortgagee.[3]

43. Mr. Cruise remarks:[4] — " This right acquired the name of *an equity of redemption;* but it is not ascertained when it was first allowed. Lord Hale is reported to have said, that, in 14 Rich. 2, the parliament refused to admit of an equity

[1] 4 Kent, 158.
[2] 2 Story, Eq. § 1029.
[3] Parsons *v.* Welles, 17 Mass. 423.
[4] 2 Cruise, 62.

(*w*) In connection with the estate of a mortgagor, known as an *equity of redemption*, it may be remarked, that, in general, the same name is applied to the mortgagor's interest, before forfeiture. Technically, this is inaccurate, because such interest is a *legal;* not an equitable one. In the statute law of North Carolina and Florida, the distinction is nicely observed; the one interest being termed a *legal right of redemption*, the other an *equity of redemption*. 1 N. C. Rev. St. 266; Thomp. Dig. 355. See State *v.* Laval, 4 M'Cord, 340.

of redemption. (*x*) This appears to be a mistake; for in the case alluded to by Lord Hale, and of which he has stated a part in his History of the Common Law,[1] the mortgagor asserted that he had paid the money, and prayed to have his lands again; nor did the idea of an equity of redemption exist for some centuries after; for although Tothill has mentioned a case in 37 Eliz., where a mortgagor had a decree in Chancery for a reconveyance of lands mortgaged, yet no mention is made by Lord Coke of an equity of redemption; from which it may be presumed, that it was not then generally known. It is, however, probable, that this doctrine was introduced in the reign of James I., when the Court of Chancery had established its equitable jurisdiction. And in the first year of Charles I., there is a case in which this right is supported, as a thing of course."

44. It was in reference to this interference of a court of equity with mortgages, that Lord Hale made the remark so often quoted, that, "by the growth of equity on equity, the heart of the Common Law is eaten out, and legal settlements are destroyed."[2]

45. Chancellor Kent says:[3] — "The English law of mortgages appears to have been borrowed, in a great degree, from the Civil Law; and the Roman *hypotheca* corresponded very closely with the description of a mortgage in our law. The land was retained by the debtor, and the creditor was entitled to his *actio hypothecaria*, to obtain possession of the pledge, when the debtor was in default; and the debtor had his action to regain possession when the debt was paid or satis-

[1] Chap. 3.
[2] Roscarrick *v.* Barton, 1 Ch. Cas. 219.
[3] 4 Comm. 136; Chapman *v.* Turner, 1 Call, 252.

(*x*) Lord Hale remarks, (Roscarrick *v.* Barton, 1 Cha. Cas. 219,) that, in the fourteenth year of Richard II., parliament would not admit of an equity of redemption. But it is said not long after to have struggled into existence. About two hundred years ago, Chief Baron Hale called an equity of redemption an *ancient right*. Hardres, 469; Co. Lit. 204, b, n. 1.

fied out of the profits, and he might redeem *at any time before a sale*." (*y*)

On the other hand, Mr. Butler, whose authority upon such a point is entitled to great respect, was of opinion, that mortgages were founded on the Common Law doctrine of conditions.[1] Judge Story remarks,[2] that, whatever truth there may be in this remark, as to the origin of mortgages of land in the English law, there is no doubt that the notion of the equity of redemption was derived from the Roman law, and is purely the creature of courts of equity.

So Mr. Coote remarks,[3] that the Roman *hypotheca* closely corresponds with our idea of a mortgage. The subject in pledge was retained by the debtor, and the creditor was, in default of payment, driven to his *actio hypothecaria* to obtain possession, and at any time before sentence the debtor might redeem. By that law, the debt was the principal, the security an incident, and when the one ceased, the other ceased also; and, until sentence, the ownership of the debtor was not displaced. (*z*)

[1] 2 Story, Eq. § 1005. [2] Ibid. [3] Coote, 40.

(*y*) A French *hypothéqué* of land, in which the conveying words are *obligé*, *engagé*, *aliené*, *affecté*, *et hypothéqué*, is equivalent to a mortgage under the law of Missouri, and is embraced in the provisions of the territorial act of October 20, 1807, concerning mortgages. McNair *v.* Lott, 25 Mis. 182.

(*z*) Mr. Powell remarks, in reference to the *origin* of mortgages, that mortgages are supposed by some to have originated with the Jews. 1 Pow. 1; Cunœus, 11, 2, 3, 4; 2 Anc. Un. His. 130, 131. In the year of jubilee, all lands reverted to the original owner. Hence, at any time after a conveyance, the grantor might redeem, repaying the value from the time of redemption to the jubilee.

It may be added, that among the Jews, as in later days, mortgages seem to have been most in use in times of general distress. Thus, it is recorded in the book of Nehemiah, (ch. v. 1, 3, 4, 7,) in reference to those who had returned from the captivity to Jerusalem: "And there was a great cry of the people and of their wives against their brethren, the Jews. . . We have *mortgaged* our lands, vineyards, and houses, that we might buy corn, because of the dearth. . . We have borrowed money for the king's tribute, and that

upon our lands and vineyards. . . Then I . . rebuked the nobles and the rulers, and said unto them, 'Ye exact usury, every one of his brother.'"

Mr. Powell further remarks, in reference to the antiquity of mortgages in England, that William, Earl of Poictiers, mortgaged the provinces of Guienne and Poictou to William Rufus, King of England. 1 Pow. 3; 1 Hume, 270; 4, 80.

CHAPTER II.

DEFEASANCES.

1. Nature and history of defeasances.
5. Deed and defeasance must be concurrent; whether the date of both must be the same.
7. Language of a defeasance.
9. Form, and mode of execution, of a defeasance; whether a seal is necessary.
10. Defeasances in the United States.
11. Recording of defeasances.

1. A MORTGAGE may be made by an absolute deed and a *defeasance* (*a*) back to the grantor, instead of a single conditional deed. In England, this form of mortgage has been at times discountenanced by the judges, as liable to accidents and abuse, indicative of fraud, and injurious to the mortgagor, because the defeasance might be lost, and thus the grantee's title made absolute.[1] It would appear, however, to

[1] Cotterell *v.* Purchase, Forr. 63. See Newcomb *v.* Bonham, 1 Vern. 7; Jaques *v.* Weeks, 7 Watts, 269; Dey *v.* Dunham, 2 Johns. Cha. 191; Manufacturers, &c. *v.* Bank, &c. 7 W. & S. 335; Scott *v.* McFarland, 13 Mass. 309;

(*a*) Even a *contract to convey*, in consideration of a certain sum, with a bond to reconvey upon repayment, is held a mortgage. Harrison *v.* Lemon, 3 Blackf. 51. Whether a defeasance can be treated by the grantor as a *personal obligation*, and a suit maintained upon it as such, at his election, see Watkins *v.* Gregory, 6 Blackf. 113; Treat *v.* Strickland, 10 Shepl. 234. In an early case in Massachusetts, (Holbrook *v.* Finney, 4 Mass. 569,) Parsons, C. J., says: "These two instruments must therefore be considered as parts of one and the same contract, in the same manner as a deed of defeasance forms with the deed to be defeated but one contract, *though engrossed on several sheets*."

Debt on bond. The bond was made by the defendant to the plaintiff, in connection with a deed of land from the plaintiff to him, conditioned to reconvey to him, his heirs, &c., upon being indemnified from a note on which the defendant was a surety, by payment thereof on or before a certain day. It seems, the transaction constitutes a mortgage, and the plaintiff, having conveyed the land to a third person, though after paying the note and demanding a deed from the defendant, thereby ceased to have any interest in the bond, which passed, as a defeasance, with the estate. Hogins *v.* Arnold, 15 Pick. 259.

have been an ancient mode of mortgaging. Thus, in the case of Jackson *v.* Vernon,[1] decided in 1789, Heath, J., speaks of the instrument then under consideration, as "not in the modern form, but like an ancient mortgage by deed absolute, with another deed of defeasance."

2. Mr. Coote says, in consequence of the discouragement it received, this mode of mortgage has become almost obsolete.[2]

3. In Cotterell *v.* Purchase,[3] a leading case on this subject, the plaintiff, in 1708, by lease and release conveyed to the defendant, with a covenant, that she (the plaintiff) would not agree to any division or partition of the estate (she being a joint tenant) without license, &c., of the defendant. The joint owner with the plaintiff was at the time in possession of the whole estate, and so continued till 1710, when the defendant turned her out by ejectment from a moiety of the premises, and enjoyed it quietly till 1726. The plaintiff then files a bill to redeem, and the defendant claims as an absolute purchaser. It appeared, that the plaintiff had made a previous conveyance of the same premises, absolute at law, but intended by the parties as a mortgage; that this deed was cancelled upon the making of the second one, and in consideration of a further sum, making the whole debt and interest, the new conveyance made. The Lord Chancellor, in dismissing the bill, remarked:[4] — "The case is something dark. The first deed is admitted to be a mortgage; and the second is made in the same manner, excepting an odd sort of a covenant, which is the darkest part of the case; for, to suppose that it is an absolute conveyance, and to take a covenant from one who had nothing to do with the estate, makes both the parties and covenants vain and ridiculous. But then it will be equally vain and ridiculous, if you suppose the deed not an absolute conveyance." After com-

Taylor *v.* Weld, 5, 109; Breckenridge *v.* Auld, 1 Rob. (Va.) 148; Van Wagner *v.* Van Wagner, 3 Halst. Ch. 27; Shaw *v.* Erskine, 43 Maine, 371; Cornell *v.* Pierson, 4 Halst. Ch. 478.

[1] 1 H. Bl. 119.
[2] Coote, 156.
[3] Ca. Temp. Talb. 61.
[4] Ibid. 63, 64.

menting upon the circumstances of the case, as bearing upon this question, he proceeds to say: "Her long acquiescence under the defendant's possession is to me a strong evidence that it was to be an absolute conveyance, otherwise the length of time would not have signified; for, they who take a conveyance of an estate, as a mortgage, without any defeasance, are guilty of a fraud; and no length of time will bar a fraud. In the Northern Parts, it is the custom in drawing mortgages to make an absolute deed, with a defeasance separate from it; but I think it a wrong way; and to me it will always appear with a face of fraud; for the defeasance may be lost, and then an absolute conveyance is set up. I would discourage the practice as much as possible."

4. An instrument of defeasance may be construed to create a mortgage, although the parties have acquiesced, for a long time after the period of payment stipulated therein, in the conveyance of the property; more especially, if it is a reversionary interest. Thus the plaintiff, being indebted to the defendant, made an absolute assignment of a reversion, taking back a memorandum that the defendant would reconvey, upon repayment, with interest, in six months; the plaintiff paying part of the costs. Nothing further was done for eighteen years. Held, a mortgage.[1]

5. In general, the defeasance and the deed must be parts of one transaction or assurance, and made by the same species of assurance, to constitute a mortgage. A conveyance must be a mortgage, if at all, *in principio*, or *at the time of its inception;* it never can become one by a subsequent act. If there was ever a moment, when it could be considered only as an absolute estate, it must ever remain so. And a subsequent agreement to make an absolute deed a mortgage, without a new consideration, has been held void, as *nudum pactum*. The mere *date* of the defeasance, however, may be subsequent to that of the deed.[2] That the deed and defea-

[1] Waters *v.* Mynn, 14 Jur. 341.

[2] Bryan *v.* Cowart, 21 Ala. 92; Com. Dig. Chancery, 4, A 3; Bro. *Defeasance*, 5, 12; Dyer, 315; 2 Saund. 481; Albany's case, 1 Co. 113; Reitenbaugh *v.* Ludwick, 31 Penn. 131; Capen *v.* Richardson, 7 Gray, 369; Lund *v.* Lund, 1 N. H. 41; Marden *v.* Bab-

sance were executed on different days, cannot be inferred from their having been witnessed by different persons, more especially if they bear the same date, and evidence is offered tending to show that they were executed on the same day.[1] (*b*)

6. The general principle upon this subject has been thus expressed in Massachusetts: "When the deed was originally given absolute in its form, but with an agreement made in good faith, that a defeasance should be executed on request; when such defeasance was executed in good faith, it related back to the deed, and made it a mortgage. Had the estate been attached as the grantee's, in the mean time, it might be attended with difficulties, but they do not now arise. Where the delay of the defeasance does not affect third persons, the defeasance, when made, is good between the parties."[2] And where a deed was made without the knowledge of the grantee, and placed on record, and in the course of a month afterwards the grantor informed the grantee of it, and requested him to get the deed from the registry, which he accordingly soon did, and thereupon gave back an obligation to reconvey upon being indemnified for certain liabilities; this was held a good defeasance.[3]

So in Pennsylvania,[4] Huston, J., makes a distinction between the case of a deed and agreement of separate and dis-

cock, 2 Met. 103; Harrison *v.* Trustees, &c. 12 Mass. 463; Kelly *v.* Thompson, 7 Watts, 401; Freeman *v.* Baldwin, 13 Ala. 246; Erskine *v.* Townsend, 2 Mass. 495; Bodwell *v.* Webster, 13 Pick. 413; Bryan *v.* Cowart, 21 Ala. 92.

[1] Taylor *v.* Weld, 5 Mass. 116, 117.

[2] Per Shaw, C. J., Lovering *v.* Fogg, 18 Pick. 543. See Scott *v.* Henry, 8 Eng. 112.

[3] Harrison *v.* Trustees, &c. 12 Mass. 456.

[4] Kerr *v.* Gilmore, 6 Watts, 405.

(*b*) In Maine, they must be executed at the same time, or be parts of the same transaction. Me. Rev. St. ch. 89, § 1; 43 Maine, 371. See 2 Greenl. Cruise, 81, *n.* In that State, it is held, that, in case of conveyance by husband and wife, the bond may be given to the wife alone. Mills *v.* Darling, 43 Maine, 565. The distinction is taken in Pennsylvania, that, if a defeasance be simultaneous with the deed, the Court must, as matter of law, hold the transaction a mortgage; but if subsequent, it is a question for the jury whether a sale or a security was intended. Wilson *v.* Shoenberger, 31 Penn. 295; Reitenbaugh *v.* Ludwick, Ib. 131.

tinct dates, and arising out of contracts really separate, and one, where they are of the same date, and executed at the same meeting of the parties, before the same witnesses, and therefore in point of law one transaction; holding that the latter must be a mortgage, whereas the former may be a sale, if there are not circumstances showing it to be a mortgage. And in the same State,[1] Sergeant, J., remarked, with reference to an instrument of defeasance bearing date after the deed: — "It is true, dates and papers of this kind may be affected, if it can be shown that the whole was merely a scheme or contrivance; that in reality it was a loan merely, and that the defeasance was understood and agreed on in the original arrangement, and the discrepancy of dates was merely accidental, or with a sinister design." So, in New York, in regard to the *proof* and the *burden of proof* upon this subject, Chancellor Walworth says:[2] — "The complainant having given an absolute conveyance, and this writing not being in terms a defeasance thereof, the *onus* of showing that both were executed at the same time, and in pursuance of the same agreement, is unquestionably thrown upon the complainant. And having waited twelve years before he filed his bill, and until Gridley, who drew the writing, and who probably was the only person who could have proved the circumstances under which it was given, was dead, he should now be held to strict proof."

7. The precise language of the defeasance is immaterial. The more usual form is, that the deed shall be *void* on payment of the debt within or at a specified period. But this is not absolutely necessary, and a provision, that upon such payment the grantee shall *reconvey*, is equally effectual, more especially if the condition expressly recites, that the conveyance is made as a security for money due.[3] (See ch. 1, s. 36.) So a conveyance of land for a certain consideration, with a covenant by the grantee to reconvey on payment of

[1] Kelly *v.* Thompson, 7 Watts, 404.
[2] Holmes *v.* Grant, 8 Paige, 255, 256.
[3] Erskine *v.* Townsend, 2 Mass. 497; Webb *v.* Patterson, 7 Humph. 431; McGan *v.* Marshall, ib. 121; Hammonds *v.* Hopkins, 3 Yerg. 525; Bayley *v.* Bailey, 5 Gray, 505; 4 Allen, 417; Weed *v.* Stevenson, 1 Clark, 166.

that sum within one year, constitutes a mortgage, notwithstanding parol evidence of the parties' intention to the contrary.[1] So the condition of defeasance need not be inserted in the body of the deed; but may be added underneath.[2] And a condition on the back of an absolute deed, though without date, signature, or seal, has been held to constitute a defeasance; more especially as the demandant counted on his seisin in fee and *mortgage*.[3] So a sealed agreement to reconvey, upon repayment of the price within a certain time, indorsed on the agreement, is held to constitute a mortgage, and parol evidence not received to the contrary.[4] So, where a deed upon its face purported to be an absolute conveyance, but upon its back contained a condition in usual form for the payment of a note; it was held, that at law as well as in equity the instrument was a mortgage, the indorsement showing the purpose for which the deed was delivered, as collateral security for the payment of money.[5]

So an agreement indorsed upon an absolute deed, that the vendee should execute certain notes for the purchase-money, with security, and that the agreement should "act as a lien" upon the land, until the notes should be satisfied in full; signed, sealed, and aknowledged by the vendor and vendee, and recorded with the deed; is to be regarded as a part of the deed, and operates as a lien upon the land.[6]

So, in a writ of entry, the tenant avers, that, at the time of the conveyance under which the demandant claims, the demandant executed to him a deed of defeasance, containing an agreement of the parties, as follows: The tenant, in consideration of $2,000 to be paid him on the tenant's conveying to the demandant in fee, agrees to execute such conveyance; the demandant agrees to pay him that sum; the conveyance, after registry, is to be deposited with a third person till repayment of the same with interest, or till a certain

[1] Colwell *v.* Woods, 3 Watts, 188.
[2] Kent *v.* Allbritain, 4 How. (Miss.) 317.
[3] Stocking *v.* Fairchild, 5 Pick. 181; acc. Whitney *v.* French, 25 Verm. 663.
[4] Brown *v.* Nickle, 6 Barr, 390.
[5] Perkins *v.* Dibble, 10 Ohio, 433.
[6] Baldwin *v.* Jenkins, 23 Miss. 206.

day; in default of such payment, the deed to be delivered to the demandant, who may thereupon enter and take the profits. The tenant claims, that the transaction constitutes a mortgage, and to be heard in chancery. Held, a mortgage.[1] So a conveyance to a trustee, with power to sell, pay a debt from the proceeds, and deliver the balance to the grantor, upon his failure to pay the debt, is held a mortgage, and to take effect only from registration.[2] So a conveyance for the full value of the land, with a written agreement, that, if the grantee could sell it for more within two years, with interest and the cost of repairs, the surplus should be paid the grantor, was held a mortgage, though the grantee swore in his answer that he considered it a sale.[3] So an absolute deed to a creditor, with the understanding that he should pay his own debt, indemnify himself against his liabilities, and satisfy other creditors, and pay the balance to the debtor's wife and children; was held a mortgage as to the debt of the grantee, and a trust for the balance.[4] And a lease for years by indenture, the lessor acknowledging the receipt in advance of a certain sum, as rent in full for the whole term, and the lessee covenanting to reconvey on repayment of such sum with interest, is a mortgage, with the same privileges as a mortgage of the freehold, though executed only by the lessor, if the lessee accepts and takes possession under it.[5] In such case, though there is technically no covenant by the lessee, upon which an action will lie, yet, if he underlet and receive rent during the term, to the full amount of the sum paid, with interest, his estate ceases, and the title revests in the lessor. If he receive more than that sum, the surplus is received by him, not as mortgagee, but for the lessor, who may maintain *assumpsit* for money had and received against him.[6]

8. But a bond, given two years after the deed, to convey

[1] Carey *v.* Rawson, 8 Mass. 159.
[2] Woodruff *v.* Robb, 19 Ohio, 212.
[3] Gillis *v.* Martin, 2 Dev. Ch. 470. See English *v.* Lane, 1 Port. 328; Bennett *v.* Union, &c. 5 Humph. 612.
[4] McLanahan *v.* McLanahan, 6 Humph. 99.
[5] Nugent *v.* Riley, 1 Met. 117.
[6] Ibid.

to the wife of the grantor, upon payment of certain notes, does not constitute a mortgage; and parol evidence is held inadmissible, that the grantor was allowed by the grantee to retain possession, that the deed was given as security, and the bond not made at the same time with the deed, only because the amount due had not then been ascertained.[1] Nor does a written agreement by the grantee, that he will, at his election, either reconvey upon payment of his debt, or sell the land, pay himself from the proceeds, and pay over the balance to the grantor, constitute a mortgage.[2] Nor an agreement under seal by a purchaser of land, with an agent of his creditor, assigning to the agent all his interest in the land, in trust for the creditor, and promising to give the creditor a mortgage, as soon as he should obtain a deed.[3] Nor a decree that a party is entitled to certain lands, and that he be let into possession, charged with the payment of a certain sum to another person.[4] So, where A., having sold land to B., conveyed the same to C., who was surety upon a note signed by B., and C. gave B. a bond, conditioned to convey to him, upon being indemnified for his liability on the note; held, C. was not a mortgagee, but the absolute owner of the estate.[5] So, upon a loan of money, a scrivener drew a deed of land and a bond of defeasance, which were executed, and the deed delivered, but, by agreement, the bond left with him, to be delivered to the obligee if within a certain time he should repay the money, otherwise to the obligor. The money not being repaid within the time, the bond was given up to the obligor; and, the obligee having died before it was thus given up, his administratrix brings a bill in equity to redeem, against a purchaser with notice from the obligor. Held, the bond was an *escrow*, and did not constitute the transaction a mortgage, and the bill was dismissed.[6] So a parol agreement was made between A. and B., that A. should pay for certain lands, and, on being reimbursed by B. there-

[1] Bennock *v.* Whipple, 3 Fairf. 346.
[2] Fuller *v.* Pratt, 1 Fairf. 197.
[3] Humphreys *v.* Snyder, 1 Morr. (Iowa,) 263.
[4] Davenport *v.* Bartlett, 9 Ala. 179.
[5] Fowler *v.* Rice, 17 Pick. 100.
[6] Bodwell *v.* Webster, 13 Pick. 411.

for, convey them to B. The lands were sold at sheriff's sale, bought by A. with his own money, and conveyed to him by the sheriff. Held, the sheriff had no authority to take a mortgage, either from the purchaser at the sale, or his assignee; and that the contract between A. and B. was simply a contract for a purchase of the premises, and did not possess any attribute of a mortgage.[1] So a conveyance was made, in consideration of $200. If the grantee do not make $200 out of the land, the grantor to refund the deficiency. Ten years afterwards, the grantor brings a bill to redeem, after several transfers of the land. Held, the deed was not on its face a mortgage; if so intended, it gave only a right to redeem the proceeds of the land from the grantee himself; and this right was waived by the grantor's declining an account.[2]

9. In general, a defeasance must be an instrument of as high a nature as that which it is designed to defeat. Therefore, to constitute a mortgage, it must be *a specialty*, or *under seal*, because the conveyance which it accompanies is itself made by deed. Thus, where A. conveyed, by deed, certain lands to B., and took back a writing, not under seal, signed by B., whereby he promised to reconvey the same, upon payment of certain moneys by a certain day; held, such promise did not constitute a mortgage; that the time of payment was to be regarded as of the essence of the contract, even in a court of equity, and that, after default, A. had not any attachable interest.[3] (*c*) It will be presently seen, that this

[1] Stephenson *v.* Thompson, 13 Ill. 186.

[2] Floyd *v.* Harrison, 2 Rob. (Va.) 161.

[3] French *v.* Sturdivant, 8 Greenl. 246.

(*c*) See Mass. Gen. Sts. 716. In the case of Harrison *v.* The Trustees, &c. (12 Mass. 456,) the statement of facts set forth, that the instrument set up as a defeasance "was not under seal," (p. 457.) But, in the opinion of the Court, (pp. 463, 464,) it is repeatedly called "a bond," and the only objection urged against it by counsel, or considered by the Court, appears to have been, that it was not executed at the same time with the deed, which could hardly have been the case, had it been an unsealed instrument. In

rule is not adhered to in courts of equity.[1] And it is not applied, where there is the additional reason for allowing redemption, that the conveyance was made by mortgagor to mortgagee. Thus, a second mortgagee took an absolute deed, giving back an unsealed agreement to dispose of the land, apply the proceeds upon the mortgage debts, and pay over any surplus to the mortgagor, and, if necessary to perfect the title, to foreclose the second mortgage. He accordingly foreclosed the second mortgage, and the land was sold under the decree, subject to the first mortgage, for less than one twentieth of the second mortgage debt and costs. The second mortgagee took possession and kept down the interest on the first mortgage, and paid the taxes, but these amounts exceeded the income of the estate. Upon a bill brought by him against the mortgagor, it was held, that the absolute deed to the second mortgagee, with the written defeasance, constituted only a further security for his debt, and he could not, therefore, pass a good title to a purchaser with notice; and that he might maintain this bill, to ascertain the amount due him upon his original bond and mortgage and subsequent payments, and for a sale and decree for the deficiency.[2]

10. The subject of defeasances is in this country very generally regulated by statute. An act of Rhode Island[3] speaks

[1] See Marshall *v.* Stewart, 17 Ohio, 356.

[2] Parsons *v.* Mumford, 3 Barb. Cha. 152.

[3] R. I. Laws, 204.

---

the case of Wendell *v.* N. H. Bank, (9 N. H. 419,) a mortgage was absolutely assigned by a sealed instrument. A writing was given back, not under seal, acknowledging it as *security*. Held, the defeasance was invalid, if the property was real, for want of a seal; if personal, there could be no redemption in New Hampshire.

A bill in equity alleged, that a seal was by mistake omitted from an absolute deed, and prayed that the defendant might be compelled to affix his seal. It appeared that there was a defeasance, making the deed a mortgage. Held, under the general prayer for relief, the Court could not decree a foreclosure. Moore *v.* Madden, 2 Eng. 530.

of a bond of defeasance, or other instrument which creates a mortgage or redeemable estate. Like expressions are used in Illinois and New Jersey.[1] In the latter State, *any writing* may operate as a defeasance. In Delaware,[2] the language is, "a defeasance or a written contract in the nature of a defeasance, or for reconveyance of the premises, or any part thereof." In New Hampshire, the condition of the mortgage must be contained in the deed itself. But reference to a bond, made at the same time with the deed, is sufficient; or to private papers in the hands of the parties.[3] The Revised Statutes define a mortgage as a conveyance to secure payment of money, or performance of any other thing stated in the conditions thereof.[4] In Florida, all *writings* of conveyance, to secure payment of money, are mortgages.[5] In Massachusetts, in case of an absolute deed, with a deed of defeasance, bond, or other instrument given back, the latter must be recorded, in order to be effectual against any one but the grantee, his heirs, or devisees, or those having actual notice.[6] (*d*) In Iowa, a party having notice of a defeasance is bound by it.[7]

11. In general, express provision is made by statute for the recording of defeasances. In Pennsylvania and Indiana, the defeasance must be recorded, to be valid against creditors, &c. In New Jersey, the registration of the deed is invalid, so that the grantee shall not have the benefits, &c., of a mortgagee, unless with it he record a note or abstract of the defeasance. So in Delaware. In this State, the defeasance is void against *bonâ fide* purchasers, unless the grantor also record it within a certain time.[8] In Illinois, the act provides,

[1] Ill. Rev. L. 131; 1 N. J. L. 464; N. J. Rev. St. 658. See Kintner *v.* Blair, 4 Halst. Ch. 485.
[2] Dela. St. 1829, 91.
[3] Bassett *v.* Bassett, 10 N. H. 64; Boody *v.* Davis, 20 N. H. 140. See Tifft *v.* Walker, ib. 150.
[4] N. H. Rev. St. 245.
[5] Thomp. Dig. 376.
[6] Mass. Rev. St. 407, ch. 59, § 27.
[7] Hall *v.* Savill, 3 Iowa, 37.
[8] Ub. sup. Ind. Rev. Sts. 232. See Thompson *v.* Mack, Harring. Ch. 150.

(*d*) The exception applies to the assignee in insolvency of the grantor. Stetson *v* Gulliver, 2 Cush. 494. (See s. 11.)

that a party "shall not have the benefit" of a defeasance, unless recorded within thirty days.[1] In Pennsylvania, it must be recorded, to bind creditors, &c., without notice.[2] In Michigan, a purchaser with notice is bound without registration; but not a judgment creditor or execution purchaser.[3] In Rhode Island,[4] any bond or other instrument of defeasance shall be recorded in the office of the town clerk in the town where the land lies, within five days from the execution; otherwise, such defeasance is invalid against a *bonâ fide* purchaser without notice.

12. In the case of Friedley *v.* Hamilton,[5] decided in Pennsylvania, it was held, that an absolute deed and defeasance, made at the same time, constitute a mortgage; but unless the defeasance is recorded, the conveyance is to be considered as an unrecorded mortgage, and postponed to a subsequent judgment, although the deed itself has been duly recorded. Gibson, C. J., remarks: — "Deeds, which are parts of the same transaction, constitute but one instrument. The mortgage in this instance, (for such it undoubtedly is,) consisted of an absolute conveyance, and a bond with condition to reconvey on payment of six thousand dollars by the grantor. The absolute conveyance has been recorded; but, according to the letter of the act of assembly, the mortgage, which consists of all its parts, has not; and it remains to be seen, whether it be well recorded within the equity of the act. The sum of the argument in support of the affirmative is, that, as the parties interested were bound to take notice of the absolute conveyance, which was undoubtedly well recorded, enough was done to lead to an inquiry into the true nature of the transaction, which is said to be equivalent to full notice. Constructive notice from facts is a conclusion of law, which can be drawn only from facts actually within the knowledge of the party, and never from those of which he had only constructive notice; else we should have construction on con-

[1] Ill. Rev. L. 131.
[2] Jaques *v.* Weeks, 7 Watts, 261; Manuf'rs, &c. *v.* Bank, &c. 7 W. & S. 335.
[3] Mich. Rev. St. 261.
[4] Rev. Sts. 1857, p. 340.
[5] 17 S. & R. 70.

struction, and inference on inference, without beginning or end. The registry of a deed was intended itself to contain all the essential parts of full and complete notice of every fact necessary to be known, instead of barely putting the party on the scent, and requiring him to run all around the world after the grantor and the grantee, seeking information as to the true nature of the transaction. The deed recorded here was notice of nothing but what it purported to be, and by that the creditor was informed that the land had been conveyed unconditionally."

13. In the case of Jaques *v.* Weeks,[1] in the same State, it was held, that, in case of a deed and defeasance, the recording of the deed alone was not sufficient, within the recording acts, as against a subsequent *bonâ fide* purchaser or creditor of the grantor without any other notice; that, if a *purchaser* have notice of the deed and defeasance, he is in equity bound in all respects like the party under whom he claims; but that it is otherwise with a judgment creditor, or an execution purchaser, because a judgment has priority over an unrecorded mortgage. Sergeant, J., remarks:[2] — "No reason exists, why a difference should be made, in the duty of the parties to put the lien on record, where but one instrument is used, and where there are two. The great object of the recording acts is, to compel those, who claim a priority of conveyance or lien, to place the true nature of the transaction on record, so that all may have recourse to it for correct information; but, if the deed alone be recorded without the defeasance, a false notice of the transaction is given. To allow this to be valid, leaves it in the power of the parties to hinder and defeat purchasers and creditors, by making that, which was in reality a mortgage, bear the appearance of an absolute deed, or otherwise, just as it suits their purposes. The mortgagee may thus become a secret trustee for the mortgagor as to the surplus beyond the money actually due. To say that the mortgagor may or may not record the defeasance, as he pleases,

[1] 7 Watts, 261. [2] Ib. 268.

and that if he did not, he thereby agrees that the deed shall be absolute, is to enable a party to make it either a mortgage or absolute deed, at his pleasure; whereas the character of the instruments is indelibly stamped upon them at their original formation, constituting them in law a mortgage with all its incidents; and, if it were once a mortgage, it always continues to be so, not liable to be changed in this respect by posterior acts or omissions."

14. Upon the same point, in New York, Chancellor Kent remarks:[1] — "A deed absolute upon its face, though taken by way of mortgage, is certainly a lawful instrument, and the party is only subjected to the hazard of having it defeated by a subsequent mortgage duly registered." And, in the same State, in the case of Dey *v.* Dunham,[2] a deed was made to the defendant, absolute on its face, with full covenants, and acknowledged and recorded as a deed on the day of its date. It was admitted, however, that the deed was taken in the first instance as security for the payment of three notes, payable in six months, and bearing date about the same time with the deed, in January, 1810. Afterwards, on the twenty-seventh of July 1810, about the time the notes became due, other notes were given in lieu of them, and an agreement under seal executed by the defendant, admitting that the former deed was only held as security, and if the substituted notes were paid, the deed was to be given up, and the lots reconveyed. This agreement was never registered. The Chancellor remarks,[3] this agreement, though not registered, "is to be considered in connection with the deed, and relates back to its date, so as to render the deed from its commencement what it was intended to be by the parties, a mere mortgage securing the payment of the notes. As a mortgage, the deed and the subsequent agreement ought to have been registered, to protect the land against the title of a subsequent *bonâ fide* purchaser. This is the language of the statute concerning the registry of mortgages; and recording the deed, as a deed,

[1] James *v.* Johnson, 6 Johns. Ch. 432.

[2] 2 Johns. Ch. 182.

[3] Ib. 189.

was of no avail in this case, for the plaintiff was not bound to search the record of *deeds*, in order to be protected against the operation of a mortgage." Upon these grounds it was held, that the title of the plaintiff, who claimed under a subsequent conveyance from the grantor in trust to pay debts, should prevail over that of the defendant, although a schedule annexed to such conveyance stated that "the title to the fifty lots is in the name of the defendant, given as collateral security to pay certain notes." To charge the trustee with notice, there should have been a statement of the amount, and number, and times of payment of the notes. The plaintiff might not have inferred, from the schedule, that the defendant held anything more than a nominal title, and perhaps as a mere trustee upon some extinguished debt. It was not even said to be a subsisting debt.

15. The rule, as to the recording of a defeasance, applies only to a bond from the grantee to the grantor; not to a bond from the grantor to the grantee, secured by the conveyance. Thus a statute in Maine provided, that the title to an estate, in the possession of any person other than the party to a bond, deed, or other instrument of defeasance, shall not be affected by it unless recorded. Held, a bond made by the mortgagor to the mortgagee, and secured by the mortgage, did not come within this provision.[1]

16. A bond of defeasance is valid in Maine against an attaching creditor of the grantor, whose attachment was made before the Revised Statutes, and who at the time of attachment had express or implied notice of the bond.[2]

17. Independently of statute, a defeasance is valid *between the parties* without registration, and constitutes the transaction a mortgage, upon which there may be conditional judgment.[3]

[1] Noyes *v.* Sturdivant, 6 Shepl. 104. See 43 Maine, 371.

[2] M'Laughlin *v.* Shepherd, 32 Maine, 143.

[3] Jackson *v.* Ford, 40 Maine, 351.

CHAPTER III.

PAROL DEFEASANCES.

Whether a mortgage can be created by parol agreement, or proved by parol evidence. Doctrines of law and equity upon the subject. Practice in the United States.

1. The rules stated in the last chapter, in relation to defeasances, are alike applicable in courts of law and of equity; giving to a deed and defeasance the same operation and effect, *in all respects*, as to a mortgage, made by a single instrument. In addition to this well-settled principle, courts of chancery have sometimes adopted the further one, that *in equity* an absolute deed may be shown to have been given as security, and thus made to operate as a mortgage, by any instrument in writing, though not under seal, and even by parol evidence. Or a mortgage may even be *presumed* from the conditions and circumstances of a conveyance.[1] It has been said,[2] the *fact* of a deed's being given as security determines its character, not *the evidence* of the fact. Also, that parol evidence that a deed is a mortgage is not heard *in contradiction of the deed*, but *in explanation of the transaction*, to prevent the perpetration of fraud by the mortgagee.[3] (*a*)

[1] Whitcomb *v.* Sutherland, 18 Ill. 578.

[2] Miami, &c. *v.* Bank, &c. Wright, 249.

[3] Bank, &c. *v.* Sprigg, 1 McL. 183, 184. See Hughes & Edwards, 9 Wheat. 489; Morris *v.* Nixon, 1 How. 118.

(*a*) The attempt to set up a deed given for security as absolute is sometimes treated as *per se* a fraud. Rogan *v.* Walker, 1 Wis. 527. It is also said, (Holmes *v.* Fresh, 9 Mis. 201,) that an absolute deed is not to be treated as a mortgage, unless all parties, not the grantor alone, so considered it; and, on the other hand, that the treatment of an absolute deed as conditional *by the grantee* makes it a mortgage. Nichols *v.* Reynolds, 1 Ang. (R. I.) 30. So it has been held, that taking judgment for the amount of the consideration of a deed is evidence to show it a mortgage. Hamet *v.*

2. It is to be observed, however, that this rule seems to be a departure from that established principle of evidence above referred to, which excludes parol proofs, to control or vary written instruments. In general, *the rules of evidence* are the same in law and equity. Their jurisdiction and power are different, in reference to facts and circumstances which have been legally proved; but the principles which govern the means of proof are substantially the same. "Equity follows the law." Blackstone says:[1] — "The rules of property, *rules of evidence*, and rules of interpretation in both courts are, or should be, exactly the same." Again:[2] — "Both courts will equitably construe, but neither pretends to *control or change* a lawful stipulation or engagement." The only deviation, in a court of equity, from the rules of evidence adopted in courts of law, is thus pointed out by the same author:[3] "When facts, or their leading circumstances, rest only in the knowledge of the party, a court of equity applies itself to his conscience, and purges him upon oath with regard to the truth of the transaction; and, that being once discovered, the judgment is the same in equity as it would have been at law." So Judge Story says:[4] — "*The modes of seeking and granting relief* in equity are also different from those of courts of common law. The latter proceed to the trial of contested facts by means of a jury; and the evidence is generally to be drawn, not from the parties, but from third persons, who are disinterested witnesses. But courts of equity try causes without a jury; and they address themselves to the conscience of the defendant, and require him to answer upon his oath the matters of fact stated in the bill, if they are within

[1] 3 Comm. 434. acc. Dwight *v.* Pomeroy, 17 Mass. 303. See 1 Sugden Vend. & P. 180.

[2] 3 Comm. 435.

[3] Ib. 437.

[4] 1 Comm. on Eq. 29.

Dundass, 4 Barr, 178. But that an absolute deed cannot be turned into a mortgage by private minutes made by the grantee. Thomaston, &c. *v.* Stimpson, 8 Shepl. 195. Records are admissible evidence for this purpose. Hall *v.* Savill, 3 Iowa, 37.

his knowledge; and he is compellable to give a full account of all such facts, with all their circumstances, without evasion or equivocation; and the testimony of other witnesses also may be taken, to confirm or to refute the facts so alleged." The following remarks of the same author, in other connections, would seem to indicate, that he does not regard this peculiarity in the practice of a court of equity, as any departure from the general rule of law with regard to parol evidence. He says:[1] — "Relief will be granted in cases of written instruments" (for mistake) "only where there is a plain mistake, clearly made out by satisfactory proofs. The rule, as to rejecting parol evidence to contradict written agreements, is by no means confined to such cases," (within the statute of frauds.) "It is founded upon the ground, that the written instrument furnishes better evidence of the deliberate intention of the parties, than any parol proof can supply." The same author remarks:[2] — "As to what constitutes a mortgage, there is no difficulty whatever in courts of equity, although there may be technical embarrassments in courts of law. The particular form or words of the conveyance are unimportant; and it may be laid down as a general rule, subject to few exceptions, that whenever a conveyance, assignment, or other instrument, transferring an estate, is originally intended between the parties as a security for money, or for any other incumbrance, whether this intention appear from *the same instrument*, or *from any other*, it is always considered in equity as a mortgage. Even parol evidence is admissible *in some cases*, as in cases of *fraud*, *accident*, *and mistake*, to show that a conveyance, absolute on its face, was intended between the parties to be a mere mortgage, or security for money." (*b*)

[1] 1 Comm. on Eq. 173, 174.

[2] 2 Ib. 335.

(*b*) In Morris *v.* Nixon, (1 How. 118,) the bill charged a fraudulent attempt to hold property unconditionally, under a deed absolute in form, but intended as a mortgage; and parol evidence was admitted, that the parties

3. Mr. Greenleaf says:[1] — "If a grantee *fraudulently* attempts to convert into an absolute sale that which was originally meant to be a security for a loan, the original design of the conveyance, though contrary to the terms of the writing, may be shown by parol." The same writer elsewhere remarks:[2] — "If the language of the deed is plainly that of an intent to make a mortgage, it is decisive; and if the parties had a different intent, the mistake is relievable only in equity, upon a bill specially for that purpose. But if the deed is in terms absolute, or doubtful in meaning, it may be shown by parol evidence of the circumstances to have been intended for a mortgage." He further says:[3] — "There are three descriptions of cases which are treated as mortgages in courts of equity. First, where the relation of debtor and creditor, in respect of the money which formed the consideration of the conveyance, is still subsisting. This relation is essential to every mortgage, founded on the agreement of the parties. Thus, a conveyance to the creditor, in trust to satisfy his own demand, is a mortgage. (*c*) Secondly, cases of fraud on the part of the creditor, or of such misconduct as ought in equity to admit the debtor to a right to redeem the land. Thus, a purchaser at a sheriff's sale, under a contract with the debtor that he may redeem, will be regarded only as a mortgagee. Thirdly, cases, where by accident or mistake an absolute conveyance was made, when only a mortgage

[1] 1 Greenl. Ev. 431.
[2] 2 Greenl. Cruise, 80, *n.*
[3] Ib. 86, *n.*

---

met upon the footing of borrowing and lending, with an offer to secure the lender by a mortgage. It also appeared, that a bond was given to the lender. Held, a mortgage in equity, unless some subsequent bargain of a different nature were proved.

(*c*) So, on the other hand, where one person took a mortgage in the name of another, declaring that he intended the mortgage for the benefit of the latter, and that the principal should be his after his own death, and received the interest during his life; it was held, that after his death the mortgage belonged to the other person. Benbow *v.* Townsend, 1 My. & K. 506.

was intended. In all these cases, parol evidence is admissible to show the actual transaction and the circumstances of the case. Where the deed is absolute in its terms, but the grantor claims it to be in truth only a mortgage, the burden of proof is on him, to show the real intent of the parties, and that the present form of the transaction arose from ignorance, accident, mistake, fraud, or undue advantage taken of his situation."

4. There can be no doubt of the admissibility of parol evidence to prove an absolute deed a mortgage, under any of the circumstances stated by Mr. Greenleaf. *Mistake*, *surprise*, and *fraud*, (to which, perhaps, should be added, *trust*,) are special grounds of equity jurisdiction; and may in all other cases, as well as the case of mortgages, be proved by parol evidence, notwithstanding the existence of a written agreement between the parties, because the general rule of evidence, above referred to, is controlled by these alleged reasons for equitable relief. It will be seen, that in some cases the admission of parol evidence to prove a mortgage has not been thus restricted. The reasons for thus restricting it, however, have been forcibly set forth by learned judges, even, in some instances, where they have been compelled by authority to decide against their own convictions. The following limitations, laid down in a recent case, may, perhaps, be considered to express the now prevailing rule and practice. The burden of proof is upon the party who alleges the absolute deed to be a mortgage. In general, mere declarations must be corroborated by facts; the parol proof must be clear and convincing; and the terms of the parol defeasance must be established.[1]

5. The early English cases upon this subject are mostly predicated upon some one of the special grounds above referred to; and, where the general rule alone has been applicable, parol evidence has been rejected. In Jason *v.* Eyres,[2] divers proofs touching parol declarations were offered

[1] Per Strong, J., Todd *v.* Campbell, 32 Penn. 253.

[2] 2 Cha. Cas. 35.

and read on both sides, of which the Court would take no notice, but rejected them. In Joynes *v.* Statham,[1] an agreement for a mortgage was drawn by the mortgagee, the mortgagor being able only to make his mark, and the mortgagee omitted to insert a covenant for redemption. Upon a bill of foreclosure, the Court permitted the mortgagor to read evidence to show the omission. The Lord Chancellor said: — "Suppose an agreement for a mortgage drawn by the mortgagee, the mortgagor being a marksman, and the mortgagee omit to insert a covenant for redemption, and then brings a bill to foreclose; shall not the mortgagor be at liberty in this court, upon reading evidence, to show the omission?" In Maxwell *v.* Montacute,[2] a person agreed to lend money on mortgage, and it was proposed that the borrower should make an absolute deed, taking a defeasance from the grantee. The deed was executed, but the grantee refused to give back a defeasance. Lord Nottingham admitted parol evidence of the agreement, and decreed in favor of the mortgagor. In Walker *v.* Walker,[3] Lord Hardwicke remarked: — "Suppose a person who advances money should, after the borrower has executed the absolute conveyance, refuse to execute the defeasance, will not this Court relieve against the fraud?" And parol evidence has been received of an absolute grantee's demanding and receiving *interest;* this being considered not a *variation* of the agreement, but an *explanation* of what it was meant to be.[4] So, where the plaintiff brought a bill for reconveyance of an estate, upon repayment of the consideration named in the deed, and the defendant *in his answer* denied any right of redemption, but admitted an agreement to hold *in trust* for the plaintiff's wife, &c., after repayment of the consideration; the Court decreed an execution of such trust.[5]

6. The doctrine upon this subject in Massachusetts has been well expressed, as follows; more particularly with ref-

[1] 3 Atk. 387.
[2] Prec. Ch. 526.
[3] 2 Atk. 99. See also Young *v.* Peachy, 2 Atk. 257.
[4] 1 Pow. 151, *a*.
[5] Hampton *v.* Spencer, 2 Vern. 288; Cottington *v.* Fletcher, 2 Atk. 155. Acc. Tibeau *v.* Tibeau, 22 Mis. 70.

erence to instruments not under seal, offered as defeasances, but, of course, applicable *à fortiori* to mere *verbal* agreements. "In chancery, whenever it appears from written evidence, that land is conveyed as a pledge to secure the payment of money, the conveyance will be treated as a mortgage, in whatever form the land was pledged; and if we had all the equity powers of a court of chancery, I should be satisfied that the conveyance in this case, with the written (unsealed) contract of reconveyance, would be deemed in equity a mortgage, and the grantee (grantor) would be allowed to redeem. But the equity powers of this Court are derived from statute, and are extremely limited. We can relieve mortgagors only in cases where the lands are granted on condition, by force of any deed of mortgage, or bargain and sale *with defeasance*. Now a defeasance of any instrument of conveyance must be of as high a nature as the conveyance, must be executed at the same time, and is to be considered as a part of it; so that the conveyance and defeasance must be taken together, and considered as parts of one contract. If, therefore, the conveyance is by deed, the defeasance must be by deed." "The counsel for the tenant referred to the statute of 1802, c. 33, which provides that no conveyance of any land, unless for a term less than seven years, shall be defeated or incumbered by any bond or other deed, or *instrument of defeasance*, unless they are registered. This provision cannot avail to enlarge our jurisdiction, which was not within the purview of the act. What shall be deemed an instrument of defeasance, must still be determined upon the principles of the common law."[1] And the same doctrine has been thus expressed in a subsequent case in Massachusetts. "The object of this bill would seem to be, to devest the mortgagee's estate by parol evidence of a promise founded on no legal con-

[1] Per Parsons, C. J., Kelleran *v.* Brown, 4 Mass. 445. The correctness of this decision has never been questioned. 22 Pick. 530. See ch. 18, § 47; Flint *v.* Sheldon, 13 Mass. 443; Saunders *v.* Frost, 5 Pick. 259; Bodwell *v.* Webster, 13 Pick. 413; Boyd *v.* Stone, 11 Mass. 342.

sideration. If here were written evidence, the want of consideration would be fatal to the claim. And without such evidence, it would be unhinging our whole system of titles in real estate, to defeat the operation of a legal instrument under seal, in this way. We are called on to enjoin against the use of a mortgage deed, by verbal proof that the respondent had given up his estate. The proposition is self-evidently false.[1] (*d*)

7. In Maine, it was formerly held, that parol evidence is inadmissible to reduce an absolute deed to a conditional one, or to show that it was intended merely as a trust.[2] And a later case decides, that, where an instrument is in form an absolute sale, though not under seal, parol testimony cannot be received to vary it, and give to it the effect of a mortgage.[3] But equity will treat as a mortgage a deed absolute in form, when it appears from the bill, answer, and proofs, that it was intended merely to secure a debt or indemnify against liabilities.[4] And where an absolute deed was decreed to be a mortgage, and the mortgage was paid; the Court ordered the grantor and grantee to release the estate to the person equitably entitled to it, with covenants of warranty against all persons claiming under them, or either of them.[5]

8. In New York, this question has often arisen, both at law and in equity, and has given rise to various and conflicting decisions. In Moses *v.* Murgatroyd,[6] where an assignment was in form absolute, but the assignee in his answer admitted it to be otherwise, parol evidence was received. In Marks *v.* Pell,[7] which was a bill to redeem, the com-

[1] Per Parker, C. J., Hunt *v.* Maynard, 6 Pick. 492.
[2] Ellis *v.* Higgins, 32 Maine, 34.
[3] Bryant *v.* Crosby, 36 Maine, 562.
[4] Howe *v.* Russell, 36 Maine, 115.
[5] Ibid.
[6] 1 Johns. Ch. 119.
[7] Ibid. 599.

(*d*) In 1736, an estate was conveyed by a deed in form absolute. In 1742, the grantee conveyed by a deed, which recited that the second grantee had purchased the first grantor's right of redemption in the estate. Held, the recital raised no presumption that the former deed was a mortgage. King *v.* Little, 1 Cush. 436.

plainant relied upon certain confessions of the defendant, the grantee; but the Court decided that the evidence was *insufficient*, the defendant having been seventeen years in the peaceable occupation of the premises as apparent owner. (*e*) In Stevens *v.* Cooper,[1] where several parcels of land were mortgaged, it was held, that the mortgagor or a purchaser from him could not set up a parol agreement made at the time of the mortgage, that, in case the mortgagor should sell either of the lots, the mortgagee would release such lot from the mortgage, on being paid so much per acre by the purchaser. In Strong *v.* Stewart,[2] it was held, that parol evidence is admissible that the defendant fraudulently attempted to convert a loan into a sale, when a mortgage was intended. In Jackson *v.* Jackson,[3] it was held, that, where a mortgage is conditioned for the payment of money, evidence is inadmissible of its being actually given to indemnify the mortgagee as bail for the mortgagor, and that no damage has been thereby incurred. So also of declarations by the mortgagee, that the mortgage was not a lien, unless a subsequent mortgagee was thereby misled. In Whittick *v.* Kane,[4] parol evidence was held admissible to show a deed a mortgage, but not as against *bonâ fide* purchasers without notice. In Patchin *v.* Pierce,[5] parol evidence was held inadmissible at law, to show that the sum intended to be secured was less than that mentioned in the deed. Chief Justice Nelson remarked: — "An absolute deed may *in equity* be turned into a mortgage by parol proof; but that is on the assumption of *fraud* in the grantee, upon which ground the action of the Court is sustained. If there is a *mistake* in the mortgage as to the amount of indebtedness of the mortgagor, the remedy,

[1] 1 Johns. Ch. 425.
[2] 4 Johns. Ch. 167.
[3] 5 Cow. 173.
[4] 1 Paige, 202. See Walton *v.* Cronly, 14 Wend. 63.
[5] 12 Wend. 61.

(*e*) Admissions of the grantee, with accompanying circumstances, were held sufficient, in McIntire *v.* Humphreys, 1 Hoffm. Ch. 31.

as in all cases of this kind, is to be sought in a court of equity." In Van Buren *v.* Olmstead,[1] it is held, that an execution purchaser may redeem, where an absolute purchase is shown by parol to have been a mortgage. In Holmes *v.* Grant,[2] that, in general, where a contract and conveyance are made upon a negotiation for a loan, and it appears that the real transaction was a loan, the lender agreeing to receive back his money with legal interest, or a larger amount within a certain time, and to reconvey; equity will treat it as a mortgage, whatever may be the form. And gross inadequacy of price is a strong circumstance in favor of this construction. In Swart *v.* Service,[3] it was held that a defendant in ejectment may set up the defence, that a deed absolute in form was in fact a mortgage, and the mortgage debt paid by the mortgagor, and may offer parol evidence of these facts, without connecting himself with the title of the mortgagor. In this case,[4] Cowen, J., remarks: — "It has often been held in the courts of equity of this State, that a deed, though absolute on its face, may by parol evidence be shown to have been in fact a mortgage in the terms offered here; and the same doctrine was held by this Court in Roach *v.* Cosine,[5] and Walton *v.* Cronly's Administrator,[6] equally applicable to a court of law, and has, it seems, ceased to be the subject of a contest; for no objection to the doctrine is now made. For one, I was always at a loss to see on what principle the doctrine could be rested, either at law or in equity, unless fraud or mistake was shown in obtaining an absolute deed, where it should have been a mortgage. In either case, the deed might be rectified in equity; and perhaps even at law in this State, where mortgages stand on much the same footing in both courts. Short of that, the evidence is a direct contradiction of the deed; and I am not aware that it has ever been allowed in any other courts of equity or law. But with us the doctrine is settled,

[1] 5 Paige, 9.
[2] 8 Paige, 243.
[3] 21 Wend. 36.
[4] 21 Wend. 38.
[5] 9 Wend. 227.
[6] 14 Wend. 63.

and I am not disposed to examine its foundations, at least without the advantage of discussion." In the same case, Mr. Justice Bronson, dissenting, remarked:[1] — "I cannot agree with my brethren, in following one or two recent cases, which hold that an absolute deed can be turned into a mortgage in a court of law, by parol evidence. Where the transaction was intended as a mortgage, and, through fraud or mistake, the conveyance has been made absolute in its terms, a court of equity, acting upon well established principles, can reform the deed. But this will only be done on a direct and appropriate proceeding for that purpose, and after such ample notice to all parties in interest, as will tend most effectually to guard against surprise, fraud, and false swearing. And, besides, a court of equity can and will protect third persons who may have parted with their money on the faith of the deed. But a court of law has neither power nor process to reform a deed. If parol evidence to contradict or insert a condition in the conveyance can be received at all, it must, of necessity, be in a collateral proceeding; and it must be received whenever either party chooses to offer it. It can be given without notice, and without the means of guarding against the obvious danger of fraud, surprise, and perjury. And, beyond this: when a court of law turns an absolute deed into a mortgage, it has no power to protect a *bonâ fide* purchaser. Other mischiefs will be likely to result from admitting such evidence; but without attempting, at this time, to point them out, I shall content myself with dissenting from what I deem a new and very dangerous doctrine." In Eckford *v.* DeKay,[2] the Chief Justice, in giving the opinion of the Court, remarked, that the particular recital of the indebtedness, as the consideration for the land conveyed, was one of the strongest indications that the parties intended an absolute deed. If the consideration had been stated generally, the fact of its being received in payment of this particular debt, must have been proved *aliunde*, by a written re-

[1] 21 Wend. 39.
[2] 26 Wend. 39. See Brown *v.* Dewey, 2 Barb. 28.

ceipt *or parol evidence;* whereas, here it appeared on the face of the deed. In Webb *v.* Rice,[1] the plaintiff claimed under a warranty deed from one Moore, and the defendant under a subsequent warranty deed from the same person. The plaintiff's deed was duly recorded, as such. The defendant offered parol evidence, to prove the plaintiff's deed a mortgage, of certain declarations of the plaintiff, subsequent to his deed, importing an agreement on his part to restore the land upon certain payments to be made by Moore, but not definitely showing the terms of such agreement. Held, the evidence was competent and sufficient to defeat the action. Bronson, J., again dissented, upon substantially the same grounds as in the former case. In a later case, it is said, parties to a deed, absolute on its face, or their privies, cannot by evidence vary its terms, or show that in fact it was a mortgage, and intended as such; and this is the rule in equity as well as at law.[2]

9. In Pennsylvania, in the case of Peterson *v.* Willing,[3] parol evidence was admitted to prove, that a mortgage running to one person was intended as security for another. In the same State it has been held,[4] that if the question, whether a mortgage or not, depend upon writings, it is for the court; if upon parol evidence, for the jury. In another case,[5] Sergeant, J., remarks: — "*When it is once ascertained*, that the conveyance is to be considered and treated as a mortgage, then all the consequences appertaining in equity to a mortgage are strictly observed, and the right of redemption is regarded as an inseparable incident." And in a still later case it is held, that the grantor of land may recover it from one who purchases of the grantee, with notice that the first conveyance was made merely for security.[6] That a deed made in consideration of a preëxisting debt, and with the understanding that the debt shall continue, is a mort-

[1] 1 Hill, 606.
[2] Taylor *v.* Baldwin, 10 Barb. 582.
[3] 3 Dal. 506.
[4] Wharf *v.* Howell, 5 Binn. 499. Acc. Carter *v.* Carter, 5 Tex. 93.
[5] Jacques *v.* Weeks, 7 Watts, 268.
[6] Cole *v.* Boland, 22 Penn. 431.

gage. And this understanding may be proved by parol evidence.[1] And that a defeasance may consist in a parol promise to reconvey, on performance of the condition.[2] It is held, however, that mere verbal declarations are insufficient, unless corroborated by the facts and circumstances of the case.[3]

10. In New Hampshire, as in Massachusetts, the rule is adopted, that, before equity will interfere for the relief of a supposed mortgagor, *the fact of a mortgage* must first be established by *legal evidence.* In the case of Bickford *v.* Daniels,[4] Judge Woodbury remarks: — "The practice and decisions must have been inadvertent, which would permit a court of common law to sit in chancery to settle a question which must be settled or agreed before they are empowered to apply any chancery principles to the case." (*f*)

11. In North Carolina, although a deed, absolute on its face, cannot be turned into a mortgage, by parol evidence of a concurrent agreement to that effect, or, in general, of mere declarations; it may be, by evidence of facts and circumstances, more especially if corroborative of declarations, which, to the apprehension of men versed in business, and judicial minds, are incompatible with the idea of a purchase, and leave no fair doubt that a security was intended.[5] The omission of a clause of redemption must be alleged to have occurred by ignorance, mistake, fraud, or undue advantage, such as gross inadequacy of price.[6] Thus, in case of a con-

[1] Todd *v.* Campbell, 32 Penn. 250; 33 Ib. 158.
[2] Kellum *v.* Smith, 33 Penn. 158.
[3] 32 Penn. 250.
[4] 2 N. H. 73. See Runlet *v.* Otis, 2 N. H. 167; Clark *v.* Hobbs, 11 N. H. 122; Boody *v.* Davis, 20 N. H. 140.
[5] Blackwell *v.* Overby, 6 Ired. Eq. 38; McLaurin *v.* Wright, 2 Ired. Ch. 94; Elliott *v.* Maxwell, 7 Ired. Eq. 246; Sellers *v.* Stalaye, Ib. 13; Mason *v.* Hearne, 1 Busb. Eq. 88; Cook *v.* Gudger, 2 Jones Eq. 172; Glisson *v.* Hill, Ib. 256; Somell *v.* Barrett, 1 Busb. 50.
[6] Kelly *v.* Bryan, 6 Ired. 283. See Streator *v.* Jones, 1 Mur. 449.

(*f*) So it is said by Judge Story: — "A court of law may be compelled, in many cases, to say that *there is no mortgage*, when a court of equity would not hesitate a moment in pronouncing that there is an equitable mortgage." Flagg *v.* Mann, 2 Sumn. 527.

veyance, for forty dollars, of an interest in a gold mine, proved to be worth four hundred dollars, the grantor was, at the time, in great distress for money, and the alleged price was not paid at the preparation or execution of the deed, nor any security given for it. The grantees, having afterwards sold the interest for four hundred dollars, retained forty dollars, and paid the grantor sixty dollars more from the proceeds. The grantor declared that the conveyance was made in trust, in presence of the grantees, who did not deny it. After the deed, the grantor remained in possession, as before, taking the profits. Held, a mortgage.[1] And the same construction was given to the conveyance, where the grantor remained in possession and use of the land more than a year; and was shown to have been pressed for money; where, moreover, the land was worth twice the amount of the consideration, and the grantee agreed, but afterwards refused, to execute a bond for reconveyance.[2] So the following facts were held to show that a deed, absolute on its face, could only have been intended as a mortgage. The consideration expressed was less than one third the value of the land, and the grantor could then have sold it for its value; under the same arrangement under which the land was conveyed, and about the same time, the grantor took a bill of sale, absolute on its face, for some perishable property, and it was admitted that it was only a security; the grantee remained in possession of the land for nearly two years, before it was claimed by the grantor, without any charge of rent; the sum paid on the mortgage of the perishable estate exceeded the amount due on that mortgage; and the sum alleged as the value of the land, and the purchase-money, was the precise and peculiar fraction of $31.40.[3]

12. In Indiana, in the case of Conwell *v.* Evill,[4] the complainant brought a bill in equity to redeem certain premises, which he had conveyed to the defendant by an absolute

[1] Blackwell *v.* Overby, 6 Ired. Eq. 38.

[2] Steel *v.* Black, 3 Jones, Eq. 427.

[3] Kemp *v.* Earp, 7 Ired. Eq. 167.

[4] 4 Blackf. 67. See Blair *v.* Bass, 4 Blackf. 539; Aborn *v.* Burnett, 2 Blackf. 101.

deed. The bill set forth, that the deed was intended for a mortgage; but the answer expressly denied it. It was held, that, though the intention alleged might be proved by parol evidence, such evidence, to be effectual, must be very clear and decisive; and that evidence of the defendant's admissions should be received with great caution. It was further held, that proof of the property's having cost the plaintiff about three times as much as the defendant paid for it, and of the plaintiff's having retained possession two years after the conveyance, did not warrant a presumption that the deed was a mortgage, against the form of the deed and the answer of the defendant.

13. In Vermont, it is well settled, that a court of chancery will treat an absolute deed of real estate, given to secure the payment of a debt, as a mortgage, as between the immediate parties, especially if the grantor remains in possession, though the defeasance rests wholly in parol.[1] The rule proceeds upon the ground, that, when there is an attempt to set up such an instrument as an absolute conveyance, there is a fraudulent application or use made of it; and this is a proper ground upon which chancery may proceed.[2] The admission of an absolute grantee, that the deed was made for a debt due him, is insufficient to make it a mortgage.[3] (*g*)

14. In Connecticut, it was formerly held, that a court of law will not admit parol evidence, as between third persons, or the parties, to show, that an absolute deed was intended

[1] Campbell *v.* Worthington, 6 Verm. 448; Baxter *v.* Willey, 9 Verm. 280; Wright *v.* Bates, 13 Verm. 348; Mott *v.* Harrington, 12 Verm. 119.

[2] 13 Verm. 349.

[3] Bigelow *v.* Topliff, 25 Verm. 273.

(*g*) A testator conveyed a farm to the defendant, taking back a bond and mortgage. The executor brings a bill in equity to compel performance of the bond, according to the plaintiff's construction thereof. The answer set forth the bond and mortgage, and a performance of the condition. Held, the question of the construction as well as performance of the bond was to be tried at law, and a bill in equity did not lie. Washburn *v.* Titus, 9 Verm. 211.

as security for a debt. Therefore, where A. conveyed to B., and B. immediately afterwards gave back to A. an agreement to reconvey on certain terms; in an action between two towns, involving the question whether B. gained a settlement under such deed, it was held, that parol evidence was inadmissible, to show, that the deed and writing were given only to secure a loan, for which A. gave his notes.[1] But a later case adopts a somewhat different doctrine. A deed was made with the following condition: "In case —— pays to —— the sum of $1,600, with interest, &c., on or before the 1st of January, 1843, then this deed shall be void," &c. The premises being afterwards mortgaged a second time, in a bill for foreclosure, brought by the first mortgagee, parol evidence was offered to prove, that, immediately before the execution of the deed to him, there was a settlement of their concerns between him and the mortgagor, and about eleven hundred dollars found to be due; that he then agreed to advance enough more to make up sixteen hundred dollars, surrendering all the previous evidences of debt, and taking a mortgage for the whole; which arrangement was effected by the mortgage; and that the mortgagee had no other security. Held, parol evidence of these facts was admissible, being consistent with the terms of the deed.[2]

15. In Rhode Island, parol evidence is admissible, notwithstanding the Statute of Frauds of that State, that an absolute deed was intended as a mortgage, and that the defeasance has been omitted or destroyed by fraud or mistake, or omitted by design, upon mutual confidence between the parties.[3]

16. The Supreme Court of the United States remark upon the same subject, as follows: — "A deed, absolute on the face of it, for property, offered to secure a loan in a case in which the parties originally met upon the footing of borrow-

[1] Reading *v.* Weston, 8 Conn. 117. See Brainerd *v.* Brainerd, 15 Conn. 575.
[2] Bacon *v.* Brown, 19 Conn. 29.
[3] Taylor *v.* Luther, 2 Sumn. 228.

ing and lending, will be considered a deed in the nature of a mortgage, to secure a loan, though another consideration shall be in the recital of the deed than the loan, unless it shall be proved that the parties afterwards bargained for the property independently of the loan; or, if it shall appear that the chief inducement of the grantor, in making the deed, was to procure the loan; or that the grantee, after the execution of the conveyance, treated the money which he had advanced as a substantial part of the consideration, and not as a loan."[1] So it has been held in the Circuit Court of the United States, that, where a deed is in form absolute, in equity it may be proved to be a mortgage, by admissions of the grantee that it was such, and that a defeasance was to be made and filed with it; by proof of moneys paid by the grantor, corresponding in amount with interest rather than rent; of his possession, long subsequent to the deed; of the relation of debtor and creditor between the parties; and of the excess of value of the land over the sum paid. The Statute of Frauds is not applicable.[2] (*h*)

[1] Per Wayne, J.; Morris *v.* Nixon, 1 How. 127. See Taylor *v.* Luther, 2 Sumn. 228.

[2] Bentley *v.* Phelps, 2 Woodb. & Min. 426.

(*h*) It may be seen, from the following additional citations, that the doctrine upon this subject, in the United States, is quite unsettled, the Courts of each State having apparently been governed in their decisions by its own local law or practice, and by the particular circumstances of the several cases which have come before them.

In Tennessee, a defeasance may be proved by parol, or by a subsequent bond. Brown *v.* Wright, 4 Yerg. 57. See Ruggles *v.* Williams, 1 Head, 141.

So, where a conveyance is made in consideration of a preëxisting debt, absolute upon its face, but it is proved that there was a condition existing, and a part of the same transaction, the Court will construe the transaction as a mortgage. Hinson *v.* Partee, 11 Humph. 587. See Scott *v.* Britton, 2 Yerg. 215; Yarborough *v.* Newell, 10 Ib. 376. But, in case of a parol condition to a written contract, omitted by fraud or mistake, equity will not *reform*, unless there be full, clear, and unequivocal proof. Perry *v.* Pearson, 1 Humph. 431. See Overton *v.* Bigelow, 3 Yerg. 513; Zane *v.* Dickerson,

10 Yerg. 373. In Arkansas, parol evidence is admissible in equity. Blakemore *v.* Byrnside, 2 Eng. 505. But this is on the assumption of fraud. Jordan *v.* Fenno, 8 Eng. 593. So in Illinois. Hovey *v.* Holcomb, 11 Ill. 660. See Coates *v.* Woodworth, 13 Ill. 654; Delahay *v.* McConnell 4 Scam. 156. In Missouri, an absolute deed cannot be shown to be a mortgage, *at law*. Hogel *v.* Lindell, 10 Mis. 483. Parol evidence has been held inadmissible in Mississippi. Watson *v.* Dickens, 12 Sm. & Mar. 608. But, in a later case, it is decided, that an absolute deed may be proved a mortgage by a contemporary or subsequent parol agreement. Prewett *v.* Dobbs, 13 Sm. & Mar. 431. See Craft *v.* Bullard, 1 Sm. & Mar. Ch. 366; Vasser *v.* Vasser, 23 Miss. 378. In Maryland, in the case of Watkins *v.* Stockett, 6 Har. & John. 435, parol evidence of a condition was held inadmissible, unless in case of fraud, surprise, or mistake. Acc. Bend *v.* Susquehanna, &c. 6 Har. & John. 128. But in such case it is admissible. Bank of Westminster *v.* Whyte, 1 Md. Ch. 536. And it has been since held, that, if the intention of the parties was to secure a debt, the deed is a mortgage. Bank, &c. *v.* Whyte, 3 Md. Ch. 508. In Texas, parol evidence is admissible, even in an action of trespass to try title, to show that a deed, absolute on its face, was intended as a mortgage. But the plaintiff cannot recover without paying the debt. Stamper *v.* Johnson, 3 Tex. 1; Carter *v.* Carter, 5 Tex. 93. As to the rule in Virginia, see Ross *v.* Norvell, 1 Wash. 14. In Alabama, Hudson *v.* Ishell, 5 St. & P. 67; English *v.* Zane, 1 Port. 328; Chapman *v.* Hughes, 14 Ala. 218; Bryan *v.* Cowart, 21 Ala. 92. In Kentucky, Murphey *v.* Trigg, 1 Monr. 72; Lewis *v.* Rolands, 3 Monr. 406; Lindley *v.* Sharp, 7 Monr. 248; Thompson *v.* Patton, 5 Litt. 74; Reed *v.* Lansdale, Hard. 6. In Delaware, Wadsworth *v.* Loranger, Harring. Ch. 113. In Georgia, U. S. Dig. 1848, 119. In South Carolina, except in case of fraud or mistake, the evidence must be clear and convincing. If the answer deny the allegations of the bill, it cannot be overcome by the testimony of one witness. Arnold *v.* Mattison, 3 Rich. Eq. 153. Equity will not relieve a grantor who makes an absolute deed to protect the property from his creditors; nor his administrator. Ib.

In California, the same question arose, where the nominal *grantee* claimed that the conveyance was a mortgage, and brought an action for the alleged mortgage debt. In such case, the defendant will be bound by an admission, that he received money for which he was to pay interest, and that the plaintiff was to reconvey on payment of the debt, accompanied with an allegation of conditional sale, and that the title was to remain in the grantee if the money was not paid. Lee *v.* Evans, 8 Cal. 424.

CHAPTER IV.

DOCTRINE OF EQUITY IN THE CONSTRUCTION OF THE CONDITION OF A MORTGAGE. RESTRICTION UPON THE RIGHT OF REDEMPTION, ETC.

1. The right of redemption cannot be restricted.
6. Though the condition is contained in a separate defeasance.
7. Or informally expressed.
8. Application of the rule to collateral or subsequent negotiations between the parties.
9. Not applicable in case of *family settlements*.
10. Exception in case of corporations.
11. Release of the equity of redemption, or cancelling of a defeasance; whether valid.
24. Contract to pay more than the mortgage debt and interest.
26. Subsequent agreement to limit the time of redemption.
28. The mortgagor has the benefit of any new acquisitions made by the mortgagee.
31. Case of *Flagg* v. *Mann*.
33. Conditional assignment of a mortgage.

1. A MORTGAGE being intended simply for security, and the nature of the transaction affording opportunity and temptation to the lender to take advantage of the necessities of the borrower; courts of equity have strenuously resisted all attempts to abridge the right of redemption, and held even express agreements for that purpose to be wholly void; contrary to the otherwise universal principle — "*modus et conventio vincunt legem*." [1] The maxim upon which they proceed is, "once a mortgage, always a mortgage." (*a*) Thus an agreement, in a mortgage, or an instrument in the nature of a mortgage, that, upon breach of the condition, the prop-

[1] Coote, 49. See Youle *v.* Richards, 415; Baxter *v.* Child, 39 Maine, 110; Saxt. 534; Cherry *v.* Bowen, 4 Sneed, Zekind *v.* Newkirk, 12 Ind. 544.

(*a*) Unless it would operate fraudulently on subsequent purchasers without notice. Miami, &c. *v.* Bank, &c., Wright, 249. See Wilcox *v.* Morris, 1 Mur. 117; Stover *v.* Bounds, 1 Ohio, (State,) 107. The civil law allowed no clog upon the right of redemption. 2 Story's Eq. § 1019.

erty shall become absolute in the mortgagee, is a nullity.[1] And a mortgagor may redeem, though in receipts and accounts he has spoken of the deed, which was accompanied by a defeasance, as an absolute conveyance.[2] So it has been held, (though under the circumstances of this particular case the decision was afterwards reversed,) that the heir of the mortgagor may redeem, though the right to redeem the mortgage is, in terms, limited to the life of the mortgagor himself, who covenants that it shall never be redeemed after his death.[3] So a jointress or assignee may redeem, though an express covenant limits the right to the heirs male of the body of the mortgagor. And connection between a mortgage and a right to redeem is said to be as inseparable as that between a distress and replevin.[4]

2. The rule thus stated has been recognized by numerous and eminent judges in various forms, but all embodying substantially the same general principle.

3. In the case of Spurgeon *v.* Collier,[5] Chancellor Northington remarked: — "The policy of this Court is not more complete in any part of it than in its protection of mortgages; and, as a general rule for that purpose, a mortgage once redeemable continues so till some act is done afresh by the mortgagor to extinguish the redemption; and a man will not be suffered in conscience to fetter himself with a limitation or restriction of his time of redemption. It would ruin the distressed and unwary, and give unconscionable advantage to greedy and designing persons." The same judge remarked, in the case of Vernon *v.* Bethell:[6] — "This Court, as a court of conscience, is very jealous of taking securities for a loan, and converting such securities into purchases; and therefore it is an established rule, that a mortgagee can never provide, at the time of making the loan, for any event or condition on

[1] Walling *v.* Aikin, 1 McMullan, Ch. 1.
[2] Bayley *v.* Bailey, 5 Gray, 505.
[3] Newcomb *v.* Bonham, 1 Vern. 7. Acc. Murphy *v.* Calley, 1 Allen, 109.
[4] Howard *v.* Harris, 1 Vern. 33, 190. See some remarks upon this case, by Marvin, J., in Boqut *v.* Coburn, 27 Barb. 233.
[5] 1 Eden, 59.
[6] 2 Eden, 113.

which the equity of redemption shall be discharged and the conveyance become absolute. And there is great reason and justice in this rule; for necessitous men are not, truly speaking, free men; but, to answer a present exigency, will submit to any terms that the crafty may impose upon them." And the same principles are affirmed in the American cases. "The law has always contemplated with jealousy any attempt to evade its provisions, in respect to the right of redemption of estates conveyed for security. And while, by reason of a breach of the condition of the deed, the estate becomes absolute in the mortgagee in law; yet equity has always preserved to the mortgagor a right of redemption of the mortgaged premises."[1] "A very distinguished chancellor said, a century past, that there had been a constant contest between equity and the rapacity of those who had attempted to take undue advantage of the poverty of those with whom they had dealings."[2] "It is not very material to criticize the precise language, which either party to the suit employs in the relation of the transaction, or to stop long in scrutinizing the various propositions made, or by which party they were made. If the transaction in the first instance appears to have been intended as a pledge or mortgage, with a proviso for a reconveyance within a certain time, such circumstance will vitiate the sale, and turn the absolute conveyance into a mortgage, and the proviso will be rejected as repugnant to the rule of equity, that the right of redemption cannot be limited or restrained."[3] "Any agreement that the assignment was to be an absolute sale, without redemption, upon default of payment on the day, was unconscientious, oppressive, illegal, and void."[4]

5. It is said by an elementary writer: — "The consideration which induced courts of equity to adopt this maxim, and to reject provisos and agreements, converting that into a sale which was originally a mortgage, on a given event, or

[1] Per Hubbard, J., Waters *v.* Randall, 6 Met. 483.

[2] Per Huston, J., Hiester *v.* Madiera, 3 W. & Serg. 387–388.

[3] May *v.* Eastin, 2 Port. 414.

[4] Per Kent, Chancellor, Henry *v.* Davis, 7 Johns. Cha. 42.

on payment of a further sum, was, that if such provisos and agreements were allowed, there would have been a door open for the imposition of every kind of restraint on the equity of redemption, and thereby the borrower, through necessity, would have been driven to embrace any terms, however unequal or cruel; which would have tended greatly to the furtherance of usury, and the conversion of the equitable jurisdiction of the Court into an engine of fraud and oppression."[1] And with respect to any express provision in the mortgage, that the mortgagor shall not claim relief in chancery, it is said: — "Equity is part of the law of England, and therefore it cannot in any manner of way be provided by agreement, in case of a mortgage, that the Court of Chancery should not give relief. For such an agreement would be contrary to natural justice in the creation of it, and prove a general mischief, because every lender would by this method make himself chancellor in his own case, and prevent the judgment of the Court."[2] (*b*)

[1] Pow. 116, *a*, n.

[2] Treat. of Eq. lib. 1, c. 1, § 4.

(*b*) The following are leading cases upon this subject. In Jason *v.* Eyres, 2 Cha. Cas. 33, the right of redemption was limited only to the father, not to his heir, who claimed to redeem. The Lord Chancellor decreed it a mortgage, saying, that, if the father had lived after three years, (the time fixed for payment of the money,) it could not be denied but he might have redeemed it; and that no mortgage, by any artificial words, can be altered, unless by subsequent agreement.

In Bowen *v.* Edwards, 1 Rep. Ch. 222, lands worth £200 per annum were mortgaged for £250, and a deed was sealed for the absolute sale of them, if the money should not be paid at the end of seven years. The mortgagee, before his death, exhibited a bill against the mortgagor for the land or the money. Held, the mortgagor might redeem from the son of the mortgagee, after the seven years had expired.

In Howard *v.* Harris, 1 Vern. 33, 190, Howard mortgages land, and the proviso for redemption was thus: — "Provided that I myself or the heirs male of my body may redeem." The question was, whether his assignee should redeem it; and it was decreed he should; for if once a mortgage, always a mortgage. In this case part of the mortgaged estate happened to

6. The same rule applies in case of a separate defeasance. As where a condition thus expressed is restricted to the joint

---

be in Mrs. Howard's jointure, and it was admitted that she thereby was entitled to a redemption of the whole mortgage.

In a note to the above case, it is stated, that the words of the proviso are, "that if he or the heirs of his body paid the £565, the mortgage-money and interest at two years' end, the conveyance to be void." Then a further sum of money was borrowed by Howard, and the above mentioned proviso was released by the deed, and another proviso contained in such last mentioned deed, that "if he or the heirs of his body begotten should at a given day therein mentioned pay £1,000, then," &c. And the mortgagor covenanted that no person should have the power or benefit of redemption except himself and the heirs of his body.

In Sevier *v.* Greenway, 19 Ves. 412, a mortgage was made for one thousand years, to secure £80, which by assignments came to the defendant, Greenway. In November, 1799, a conveyance was made, reciting these facts, and that Greenway had lent to the plaintiff, then owning the equity of redemption, the further sum of £50, and had contracted to purchase the mortgaged property at £150, from which Greenway was to retain the £50 and £80; and declaring that the plaintiff granted and released the premises to the defendants, Greenway and Marchant, their heirs and assigns, to the use of Marchant during the life of Greenway, in trust for him; remainder to Greenway and his heirs; provided, if the plaintiff within two years wished to repurchase, and paid Greenway £150 with interest, the defendants should reconvey. On the 11th of January, 1800, articles of agreement were made, reciting, that the plaintiff was entitled to and possessed of the premises, being very much out of repair; and that, not being able to repair, he had applied to Greenway to repair them at his own expense; that Greenway might do this, let the premises, and retain them till his expenses, with interest, should be repaid; the plaintiff, who had been tenant in tail, agreeing to levy a fine, and Greenway covenanting to repair the premises standing upon mortgage; and, upon being reimbursed, to deliver up the articles to be cancelled. August 12, 1800, articles of agreement were made, reciting that Greenway had expended £40 in repairs, and the plaintiff had applied to him for further repairs, and for a further loan of £10, and providing that in consideration of this loan the plaintiff would cause the tenants to quit the premises needing repairs, so that Greenway might enter and repair; that Greenway should let them, and receive the rents till repaid the £40, £10, and all sums to be laid out, with interest; that the plaintiff should not meddle with the letting of the premises, or receipt of the rents, till Greenway was fully paid; that the proviso of 1799 should be observed, and the plaintiff should not repurchase till payment of the £160 and the further

lives of the parties. Thus a mortgage was given for £1,000. A third person offered to pay off the mortgage and advance £200 more, and the mortgagor thereupon conveyed absolutely to him, with the usual covenants, including a covenant for further assurance, and the grantee by a separate deed covenanted to reconvey to the grantor upon payment of the two sums in their joint lives, it being agreed that the grantor should be tenant of the premises at the rent of £70 per annum. The grantor was afterwards arrested at the suit of the grantee for arrears of rent, carried to prison, and thence removed by means of the grantee to the house of another person, where the grantee endeavored to persuade him to give up the defeasance. He refused to do so, but made a bill of sale of all his property to his son, and soon afterwards

---

sums with interest. The fine was levied, and Greenway had been long in possession. The value of the premises in 1799 was variously estimated from £15 to £40 per annum. The plaintiff brings a bill for redemption, and Greenway by his answer alleges great improvements, as well as repairs, and claims as purchaser. Per Sir William Grant, M. R.: — "If this had rested upon the conveyance of November, 1799, possession being taken, I do not see why it should be considered otherwise than as a sale. Much stress, however need not be laid upon the circumstances relating to the taking possession, as the agreement of January, 1800, precludes that question; providing, that a fine shall be levied of the premises expressed to be standing upon mortgage; and the third instrument goes further, providing for a further loan of £10. 'I shall therefore decree upon this as a mortgage." The accounts were accordingly directed, with rests; the defendant to be allowed for repairs and lasting improvements, and the costs of taking the accounts; but having insisted on a purchase, no costs to the hearing.

In Clench *v.* Witherly, Cas. Temp. Finch, 376, a copyhold estate was unconditionally surrendered to the use of a third person, but a judgment given at the same time, as further security, with a note in writing under the hands of the parties to the surrender, agreeing that if the surrenderer should within a twelvemonth pay to said third person the consideration-money of the surrender, and all his disbursements for fines, he should surrender back the premises to the surrenderer and his heirs, and acknowledge satisfaction on the judgment. Upon a bill brought sixteen years after the expiration of the twelve months, held, the surrender and judgment were mere securities for the repayment of money, and a redemption was decreed.

died. The son was soon induced to give up the defeasance, and the grantee then claimed an absolute title. A redemption was decreed, partly upon the ground, that, if a restriction upon the equity of redemption were in any case allowable, the conduct of the defendant in this case would in equity render the right of redemption absolute, he having prevented the exercise of the right stipulated for, by fraud, oppression, and imposition.[1] So, in Jacques *v.* Weeks, a stipulation in the defeasance, that on failure to pay within one year the defeasance should be void, was held not sufficient to overrule the legal character of the instrument as a mortgage, or restrict the right of redemption to one year.[2] So a debtor conveyed an estate to his creditor for the amount of his debt, and took back a contract, providing for a repurchase, on payment, in a specified time, of the amount of the debt extinguished, and in case of default that the agreement should be null. Held, that the two transactions constituted a mortgage, and that the debtor might redeem.[3]

7. The same rule is applied to all transactions in the nature of a mortgage, whatever may be their precise form. Thus A., having purchased land, and taken a conveyance to a surety for the price, as indemnity to the surety, entered into a contract with B., by which B. was to pay the balance of the purchase-money remaining due, to take a conveyance from the surety, and to convey to A., upon payment of the money advanced by B., at a time specified. A. was to remain in possession and enjoyment of the land in the mean time, paying a rent equal to the interest of the debt to B., and to make payment without assistance from any one. Held, a mortgage, and that A. was entitled to redeem, though the money was not paid at the day, without reference to the source whence he derived the money.[4] So an agreement to convey land absolutely, given merely as security, will be subject to the rule above stated, and construed as a mortgage.

[1] Spurgeon *v.* Collier, 1 Ed. 55.
[2] 7 Watts, 261.
[3] Batty *v.* Snook, 5 Mich. 231.
[4] Walling *v.* Aikin, 1 McMullan, Ch. 1.

Thus the maker of two notes gave an instrument to his sureties on the notes, reciting that the notes were given for the purchase of land, and then adding: — "In case I fail to pay said notes, I do bind myself, my heirs, &c., to convey to said sureties the aforesaid land." Held, a mortgage, and, on failure of the principal to pay the notes, that so much of the land as would satisfy the claim of the sureties should be sold, and that the sureties were not entitled to an absolute conveyance.[1]

8. And the unrestricted right of redemption will be extended to transactions between the parties, in the nature of security for the debt, subsequent to the original mortgage. Thus if after forfeiture of a mortgage, and execution issued upon the bond secured by it, other property is conveyed to secure a portion of the debt, redeemable on payment of a certain sum at a future day; the conveyance will *relate* to the original transaction, and be held a mortgage. Hence, if after the day of payment the land is conveyed to a *bonâ fide* purchaser, even though six years have elapsed since the day of payment, the mortgagor will be entitled to an account, and to be credited with the price for which the property was sold.[2] (*c*)

[1] Courtney *v.* Scott, 6 Litt. 457.
[1] Bloodgood *v.* Zeily, 2 Caines's Cas. in Er. 124.

(*c*) It has been held that a third person may also have the unlimited right to redeem, under certain circumstances, although there is no direct mortgage from him to the party of whom redemption is claimed. Thus one having an equitable title to land sold it, and received a part of the price; but, finding difficulty in obtaining the balance, made another sale to another person, upon condition that he would advance such balance, and give the first purchaser six months to pay it; in which case the first purchaser was to have the land, otherwise the second purchaser should have it. This contract was approved by the first purchaser, who accordingly promised to pay the money to the second, and soon afterwards removed from the land, and the second purchaser took possession. The first purchaser, having failed to pay the money within the six months, brings a bill in equity to redeem. Held, as there had been no treaty for a sale, nor any discussion concerning the adequacy of the price, which was far less than the real value, the transaction constituted a mortgage, and a redemption was decreed. Pennington *v.* Hanby, 4 Munf. 140.

9. It has been held, in England, that, where a mortgage is made *to or for a relative or wife*, the right of redemption will not be allowed beyond the time stipulated, the circumstances raising a presumption that the mortgage was intended to be beneficial to the mortgagee. In case of marriage settlement, non-fulfilment of the condition is an election to abide by the settlement, and no redemption allowed, especially after the mortgagor's death, and against a *bonâ fide* purchaser from the wife. It is said,[1] that in these cases the contract will be considered as wearing a kind of double aspect; and that there is no danger of any fraud or practice against the mortgagor, which is the mischief intended to be prevented by the maxim, that an estate cannot be a mortgage at one time, and an absolute purchase at another. Thus, where one conveyed to a relation by marriage, by an absolute deed, taking back another deed, which provided that the land might be redeemed during the life of the grantor; held, the heir of the grantor could not redeem.[2] So a husband and wife made an absolute conveyance of her land by way of sale with fine. Subsequent deeds passed between the parties, which indicated that the original deeds were intended to operate as a mortgage; and there was an express recital of the fact, in one of the deeds produced from the possession of the person claiming as purchaser, but not signed by him. After the lapse of many years, and the death of the witnesses, the heir of the wife brings a bill to redeem, upon the ground that the deeds passed an absolute estate only during the life of the husband. Held, the bill should not be maintained.[3] So a conveyance in fee was made to the husband of the grantor's kinswoman, in consideration of £1,000, with a redemise for ninety-nine years, if he should so long live, containing a covenant, that, if he should pay £1,000 with interest at any time during his life, the grantee should reconvey; and, if he did not pay the money, his heirs, &c., should have no power

[1] 1 Pow. 127 *a*. Acc. Com. Dig. Chancery 4 A 3.

[2] King *v.* Bromley, 2 Abr. Eq. 595; Bonham *v.* Newcomb, 2 Vent. 364.

[3] Tull *v.* Owen, 4 Y. & Col. 192.

to redeem. After the grantor's death, the money not having been paid, his heir brings a bill to redeem. It was held, in reversal of a decree of Lord Nottingham, that the bill could not be maintained, for the following reasons :—It was proved, that the grantor intended in this transaction to *make a settlement*, and to confer a kindness and a benefit upon a mortgagee, in case he should not redeem during his life. The right of redemption being extended to the lifetime of the grantor, no foreclosure would have been allowed while he lived, even if the bargain had proved unfavorable to the grantee, by the long continuance of his life ; hence, on the other hand, no equity should be raised to deprive the grantee of the estate, upon his death. The decision was afterwards affirmed in parliament.[1]

10. An exception has been allowed to the general rule against restricting the period of redemption, in the case of *corporations*, whose charter provided for such limitation. But the language of the charter will be strictly construed in favor of the mortgagor. Thus it has been held in New York,[2] that, upon failure of the mortgagor, under the act of 1837, for loaning the United States' deposit fund, to pay the interest on the day it fell due, the loan commissioners became seised of an absolute estate in fee ; and after the day of sale, payment not being made, the mortgagor cannot maintain ejectment. In a subsequent case, this decision seems to be virtually overruled ; but the principle in a modified form is substantially reaffirmed. The facts were, that a statute, relating to loans of the United States' deposit fund, provided, that, upon non-payment of interest within a certain time from its falling due, the commissioners should "become seised of an absolute and indefeasible estate in fee," and the mortgagor "utterly foreclosed and barred of all equity of redemption, any law, &c., to the contrary notwithstanding." The statute further provided, however, for a certain right of redemption,

[1] Bonham *v.* Newcomb, 2 Vent. 364 ; 1 Pow. 127 *a* ; Wolstan *v.* Aston, Hardr. 511.

[2] Olmstead *v.* Elder, 2 Sandf. 325.

and, ultimately, for a sale of the property. Such sale having been made, and the State having become the purchaser, but the sale being void for informality; held, the mortgagor could not maintain an action for the land against a grantee of the State.[1] But where a mortgage was made to a corporation, whose charter provided, that, whenever the corporation should purchase real estate on which they made loans, the mortgagors should have the right of redemption, on payment of the debt and costs, so long as it remained in the hands of the corporation, unsold; the corporation having contracted to sell the property, one third of the purchase-money having been paid, and possession taken by making surveys, &c.: held, the right of redemption was not thereby extinguished. To produce this effect, an actual conveyance must have been executed.[2]

11. Another application of the same general principle, is that relating to *a release of the equity of redemption* to the mortgagee, or a purchase of it by him subsequent to the original transaction. This may occur either with or without an agreement for such release or repurchase, made by or in connection with the mortgage itself. The distinction has been sometimes made, between a condition that if the mortgagee, on failure of the mortgagor to pay the debt when due, pay him a further sum, the former shall become absolute owner, which is said to be void; and an agreement to give the mortgagee the right of *preëmption*, which has been assumed to be valid.[3] Chancellor Kent, however, suggests that this agreement also would be void.[4] At any rate, it will be very strictly construed, and the fairness and value must be shown by clear and convincing proof. Loose expressions of the mortgagor, that he had received satisfaction *for the land*, without identifying it, are held insufficient proof.[5]

[1] Pell *v.* Ulmar, (18 N. Y.) 4 Smith, 139.

[2] The Farmers' &c. *v.* Edwards, 26 Wend. 541.

[3] Wynkoop *v.* Cowing, 21 Ill. 570; 4 Kent, 142.

[4] 4 Kent, 142.

[5] Holridge *v.* Gillespie, 2 John. Ch. 34; Hammonds *v.* Hopkins, 3 Yerg. 525; M'Kinstry *v.* Conly, 12 Ala. 678.

12. Upon the general subject it seems to be well settled, that the mortgagee will not be allowed to make use of the incumbrance, as a means of obtaining the equity of redemption for less than its value. More especially, that the mortgagee shall not at the time of the loan contract with the mortgagor for an absolute purchase, in case the money shall not be paid as agreed, even though payment of the debt and interest is expressly limited to a particular period.[1] It has been held, that mere inadequacy of price is no ground for setting aside a purchase of the equity of redemption by the mortgagee, in consideration of the debt.[2] But, on the other hand, a purchase of the equity of redemption will be peculiarly discountenanced, where the mortgagee appears to have paid nothing for it, "but it was thrown into his bargain."[3] Thus, in case of a mortgage for £200, with a bond conditioned, that, if the sum were not paid at the day, and if the mortgagee should then pay the mortgagor the further sum of £78 in full for the purchase of the land, the bond should be void; the £200 not being paid, and the mortgagee having paid the £78; held, the infant heir of the mortgagor might redeem.[4] So a mortgage *of anticipation* was made of an estate in the West Indies, and upon an account taken, it appearing that the mortgagor owed the mortgagee a large sum, he released the equity to the mortgagee and his heirs. The consideration of the conveyance was five guineas; no release was given of the covenant for payment of the money; and the mortgagee, while in possession, kept an account as such; and both in conversation and by letter stated himself to be a mortgagee in possession, within twenty years from the commencement of the suit to redeem. Held, thirty-three years after the release, the mortgagor might redeem.[5] And, in a late case in Connecticut, the same principles have been rec-

[1] Hicks *v.* Hicks, 5 Gill & J. 85; 2 Greenl. Cruise, 97 *n;* 1 Pow. 133; Coote, 30, 33; M'Gan *v.* Marshall, 7 Humph. 121. See Thompson *v.* Mack, Harring. Ch. 150; Batty *v.* Snook, 5 Mich. 231.

[2] Purdie *v.* Millet, Taml. 28.

[3] St. John *v.* Turner, 2 Vern. 418.

[4] Willett *v.* Winnell, 1 Vern. 488.

[5] Vernon *v.* Bethell, 2 Ed. 110.

ognized as peculiarly applicable between parties holding the confidential relation of *attorney and client*. A., being an ignorant and inexperienced man, retained B., an attorney at law, in a suit about to be commenced, and conveyed to him real estate worth about $300, being his chief property, as security for fees, for expenses which B. agreed to advance, for his liability in a bond for costs, and for a small loan; B. agreeing in writing to reconvey on performance of these conditions. B. immediately took possession, which he retained, paying all taxes. B. commenced and prosecuted the suit, paying the expenses, and in about three years recovered a judgment, the amount of which fell short of his account by nearly $200. Soon after the conveyance, A. repaid the loan, and after the judgment B. paid A. a small sum on account. About a year after the judgment, A. applied for a settlement, and B. offered him ten dollars to give up the agreement for reconveyance. The money was taken, but the agreement was not given up. B. regarded this as a final settlement, but there was no proof that A. so regarded it. Soon after, A. died, and the plaintiff, succeeding to his title, brings a petition to redeem. Held, the transaction was a mortgage, in view of its purpose, of the agreement to reconvey, or of the relation of the parties; and the alleged settlement was no bar to this petition.[1]

13. It is, however, remarked by a writer upon this subject, that, "if the mortgagor sells the estate to the mortgagee for even less than its value, whether according to a stipulation in the mortgage or not, without any circumstances of fraud or indirect influence, it seems, equity will not relieve him. If there be two persons ready to purchase, the mortgagee and another, the mortgagor stands equally between them, and if the mortgagee should refuse to convey to another purchaser, the mortgagor can compel him, by applying the purchase-money, to pay off the mortgage. It can, therefore, only be for want of a better purchaser, that the mortgagor

[1] Mills *v.* Mills, 26 Conn. 213.

can be compelled to sell to the mortgagee; but courts view transactions even of that sort, between mortgagor and mortgagee, with considerable jealousy, and will set aside sales of the equity of redemption, where, by the influence of his incumbrance, the mortgagee has purchased for less than others would have given."[1] And it has been held, that, though the mortgagee cannot, by the mortgage itself, or a deed made at the same time, reserve the right of purchasing the estate at a certain price, to be paid the mortgagor if he shall not redeem within a limited time; yet he may purchase the right of redemption, if he does not use the mortgage in inducing the mortgagor to part with it for less than its value.[2] Also, that where a mortgagee, after recovering the land for condition broken, for a further consideration obtains a release of the equity, at the same time giving the mortgagor a promise to sell and convey on payment of the whole money within a certain time; at the end of this time the mortgagee's title becomes absolute. The latter bargain is considered as an original contract to convey upon certain terms; more especially, after the lapse of so long a period as sixteen years.[3]

14. In the leading case of Tasburgh *v.* Echlin,[4] (*d*) the crown, having granted a patent for certain land for a term of years, at a certain rent, granted another patent to another person, not noticing the former. The former term having nearly fifty years to run, and being worth £200 per annum, the second patentee, in consideration of £200, by lease and release conveyed to the first, with condition that he might re-enter upon repayment within five years; but, on failure of payment at the time, the estate of the grantee should be absolute and indefeasible, both in equity and at law, and the

[1] 1 Pow. 123 *a*, *n.*; Webb *v.* Rorke, 2 Sch. & Lef. 673; Dougherty *v.* McColgan, 6 Gill & J. 275.

[2] Wrixon *v.* Cotter, 1 Ridg. 295.

[3] Endsworth *v.* Griffith, 2 Abr. Eq. 595.

[4] 2 Bro. Parl. 265.

(*d*) This case is said to have been "determined on circumstances so special, that it is scarcely an authority for any subsequent case." 2 Greenl. Cruise, 97, *n.*; 1 Pow. 133; Coote, 30, 33.

grantor forever debarred from all right and relief in equity; and the grantor hereby released forever his right to redeem, on such failure. There was no covenant to pay the £200. The five years having expired, the grantee brings a bill for foreclosure, to which the grantor never made any answer or defence, and it was decreed that he should be foreclosed, unless the money were paid upon a certain day. More than thirty years afterwards, the lands having risen in value, the heirs of the grantor bring a bill in equity against the heirs of the grantee, alleging surprise and imposition in procuring the decree, and praying redemption. A decree was rendered for the plaintiffs, but reversed in the House of Lords. The grounds of argument for the defendants were, the terms of the conveyance, waiving all right of redemption; the reversionary character of the estate, yielding no present profit, and worth at the time not over £200; and the want of any covenant to pay the money, and therefore of any mutuality in the transaction, which is necessary to constitute a mortgage. So one of two joint tenants made a conveyance for £104, in form absolute, but admitted to be a mortgage. This deed was cancelled, and another similar one made for a larger consideration, including the £104, and covenanting that the grantor would not make partition without consent of the grantee. The receipts for the money spoke of it as *purchase-money*. Two years after the second deed, it was agreed that the grantor should have back the land, on payment of principal, interest, and costs. The other joint tenant being in possession, the grantee recovered the land in ejectment, and occupied sixteen years. Upon a bill to redeem, brought by the grantor; held, though the covenant against partition was a recognition of the plaintiff's remaining interest in the land, and the first deed was admitted to be a mortgage, yet the transaction, on the whole, was a subsequent agreement for repurchase, and, after the lapse of so many years, the redemption was barred.[1]

[1] Cotterell *v.* Purchase, Cas. Temp. Tal. 61. See Hunt *v.* Tyler, 2 Aiken, 233.

15. In this country, the doctrine upon the subject seems somewhat unsettled. The Supreme Court of the United States hold, that the purchase of an equity of redemption from the mortgagor, by the mortgagee in possession, especially if the former is in needy circumstances, is to be carefully scrutinized when fraud is charged; and constructive fraud, or an unconscientious advantage, is sufficient in equity to avoid the purchase.[1] So the release of an equity of redemption and surrender of a defeasance by a needy mortgagor, for no consideration, or in consideration of the correction of a mistake in the amount due, which the mortgagee was bound in equity to correct; the mortgagee being in possession, denying the right to redeem, and having originally by design so drawn the defeasance as apparently to cut off the right of redemption before the time when the equity was released; will be set aside in equity.[2] But, the mortgagor having filed his bill to redeem, nearly twenty years after the mortgage became due, and sixteen years after the release; held, the account of the rents and profits should be restricted to the time of filing the bill.[3]

16. Upon the same subject, the Court in New York remark as follows: — "I am aware of no principle, which inhibits a mortgagee from purchasing in an outstanding title, and enforcing it against his mortgagor; on the contrary, a defective title must often be cured in this way, to avoid a loss of the debt. Actual payments of prior incumbrances entitle the mortgagee, in equity, to hold till the mortgagor shall reimburse them; and in some cases, if the mortgagee can get them in by assignment, he superadds a legal title, paramount to that of the mortgagor, and valid against an ejectment. The effect of the mortgagor's repaying the money is merely to avoid the effect of the mortgage. If the mortgagee have acquired a paramount title, the act of payment will not inure as a purchase of it. As between mortgagee and mortgagor, no estoppel (of landlord and tenant)

[1] Russell *v.* Southard, 12 How. 139. [2] Ibid. [3] Ibid.

exists against the latter. The mortgagee is rather the landlord; the mortgagor being in strict law, considered as a *quasi* tenant at will. Whether equity might not, in a proper case, consider the mortgagee as a trustee, and on that ground decree that he shall stand as a purchaser for the mortgagor's benefit, on being reimbursed, is another question."[1] And it has been held in that State, that a mortgagee may by a contract subsequent to the mortgage purchase the equity of redemption; though the transaction will be viewed with suspicion.[2]

17. In New Jersey, where a mortgagee knowingly and understandingly cancels his mortgage, taking instead of it an absolute deed; a second mortgage will have precedence of his title under such deed.[3]

18. The Court in Massachusetts remark, that a defeasance may upon sufficient consideration be cancelled as between the parties, so as to give an absolute title to the mortgagee, the rights of third parties not having intervened.[4] Thus, where a bond executed at the same time with the deed was two years afterwards given up, and a new bond substituted; it was held, that the latter constituted a mere personal security, and the grantee became absolute owner.[5] But where the demandant in a suit for foreclosure produced a conveyance to himself, and then offered evidence of the execution and existence of a bond of defeasance of the same date, and the tenant then produced a bond of subsequent date and different conditions; held, the latter was not of itself proof that the former had been cancelled by agreement, with intent to render the conveyance absolute.[6] And an assignment of such bond to an assignee of the mortgage does not extinguish the right of redemption; the bond being a *chose in action*, not assignable, and the law not allowing a right of redemption to be voluntarily parted with, except by

[1] Per Cowen, J., Cameron *v.* Irwin, 5 Hill, 280, 281.
[2] Remsen *v.* Hay, 2 Edw. Ch. 535.
[3] Frazee *v.* Inslee, 1 Green, Ch. 239.
[4] Trull *v.* Skinner, 17 Pick. 213; Harrison *v.* Phillips, &c. 12 Mass. 465; Marshall *v.* Stewart, 17 Ohio, 356; Youle *v.* Richards, Saxt. 534.
[5] Rice *v.* Rice, 4 Pick. 352.
[6] Stetson *v.* Gulliver, 2 Cush. 494.

the ordinary forms of conveyance. Hence, after such assignment, a creditor of the mortgagor may acquire a title to the land by the levy of an execution.[1] In the same State it is said, no case can be found, in which it has been determined that the mortgagee can, by force of any agreement made at the time of creating the mortgage, entitle himself, at his own election, to hold the estate free from condition, and cutting off the right in equity of the mortgagor to redeem. Such an agreement would not be enforced as against a mortgagor, nor is it to be confounded with a sale upon condition.[2]

19. A release of the equity of redemption has been *implied* from a new agreement between parties interested in the estate. Thus A., the grantee of an equity of redemption, B., the mortgagee, who had entered for foreclosure, and C., who claimed title to the land, entered into an indenture, by which B. released to the others his right to foreclosure, and agreed to collect the rents and divide them among all parties in proportion to their claims against the mortgagor; and it was further agreed that the estate should be sold and the proceeds divided in the same way. Held, there was an implied release of the equity of redemption, and A. could not maintain a bill to redeem.[3] (*e*)

20. In Maine, in a recent case, a mortgagor sold to the mortgagee, for cash, the right of redemption, returning to the mortgagee the deed, which was given to him at the time the

[1] Porter *v.* Millet, 9 Mass. 101.
[2] Per Hubbard, J., Waters *v.* Randall, 6 Met. 484.
[3] Tenney *v.* Blanchard, 8 Gray, 579.

(*e*) A. brings a bill to redeem. B., a co-tenant of A., answers to the bill that he refused to join in the suit, and did not authorize the previous tender; refers the validity of the tender to the court; and states his desire to have the title remain with the defendant rather than the plaintiff. Held, no waiver of his right to redeem, and that a decree should be made in his favor, he sharing the costs with the defendant. Gentry *v.* Gentry, 1 Sneed, 87. Acc. Cherry *v.* Bowen, 4 Sneed, 415.

mortgage was made, but never recorded. The mortgagee took possession, claiming to be the owner, and A., living for some years afterwards, often stated that he had sold the land to the mortgagee. Held, after his death, his administrator might maintain a bill to redeem.[1]

21. In Connecticut it is held, that, where the subsequent purchase from the mortgagor is made under an appraisement of the property, this absence of any unfair terms in the transaction will render it legally valid. Thus, in the case of Austin *v.* Bradley,[2] Austin conveyed to Bradley certain lands, upon condition that the grantor should indemnify the grantee from certain liabilities on his account. After breach of condition, Bradley agreed to accept from Austin an absolute title, and Austin agreed to convey to him, by absolute deed of warranty at an appraised value; the balance, if the land was appraised to exceed the debt, to be paid in one year to Austin. Austin having died, the balance was tendered to his executors within the year, and a conveyance demanded. The plaintiffs, children and legatees of Austin, then file a bill in chancery against Bradley to redeem. Held, the petition should be dismissed.

22. It is said, in Kentucky, a subsequent conveyance by the mortgagor to the mortgagee "must be fairly done, in a transaction that will bear the light, and upon a consideration, the particulars of which the mortgagee will be able, at least, to state, if not to prove. It would be strange, indeed, if the Court of Chancery, which so carefully guards the equity of redemption from all restraints that the party may attempt to impose in the mortgage which creates it, or in any other contemporaneous deed, should thenceforth abandon it to the arts or influence of the mortgagee, who, having already a hold upon the property by the original contract, comes into every new transaction with the mortgagor with increased advantage."[3]

[1] Patterson *v.* Yeaton, 47 Maine, 308.

[2] 2 Day, 466.

[3] Per Marshall, J., Perkins *v.* Drye, 3 Dana, 177. Acc. Sheckell *v.* Hopkins, 2 Md. Ch. 89; Adams *v.* McKenzie, 18 Ala. 698.

23. In Michigan the distinction is taken, that the mortgagor may release the equity of redemption for valuable consideration, and without fraud or undue influence. But an executory contract for an absolute forfeiture, in case the debt is not paid at the day, will not be enforced.[1]

23 *a*. In Ohio, land was conveyed, with an accompanying contract, showing the conveyance to be security for a loan, the amount of which equalled the value of the land. The grantor dying insolvent, his administrators relinquished all title to the land for payment of debts, and directed the grantee to take it for his claim, which he did, taking possession, and never demanding payment of the debt. Some of the heirs were married women. Held, after twenty-seven years, the heirs could not maintain a bill to redeem.[2]

24. Upon the general principle, of protection to mortgagors, equity does not sanction an agreement *to turn interest into principal* at the end of a specified period; because it is a stipulation for a *collateral advantage*, and because it tends to usury, though not actually usurious.[3] So if the mortgagor agree by a distinct contract, more especially one subsequent to the mortgage, though in writing, to pay the mortgagee a sum over and above the debt, interest, and cost; such contract will be set aside as unconscionable; for, it is said, a man shall not have interest for his money, and a collateral advantage besides for the loan of it, or clog the redemption with any bye agreement.[4] So, where a note is secured by mortgage, the maker cannot, as against a third person, owning the equity of redemption, increase the charge upon the land by confessing a judgment, and thus compounding the interest.[5] (*f*) So where a person, taking a mortgage as secu-

[1] Batty *v.* Snook, 5 Mich. 231.
[2] Piatt *v.* Smith, 12 Ohio, St. 561.
[3] Chambers *v.* Goldwin, 9 Ves. 271; Coote, 501, 502. See Godfrey *v.* Rogers, 3 Cal. 101.
[4] Jennings *v.* Ward, 2 Vern. 520; Davis *v.* Jewett, 3 Iowa, 226.
[5] McGready *v.* McGready, 17 Mis. 597.

(*f*) Where by statute a penalty is imposed for omitting to make payment of school money loaned; it is held to be imposed only on the borrower, and not secured by the bond or mortgage. Bradley *v.* Snyder, 14 Ill. 262. See Broderick *v.* Smith, 25 Barb. 539.

rity for a loan, took from the mortgagor, at the same time, a covenant to convey to the mortgagee, if he thought fit, certain ground-rents of the same value; upon a bill to redeem, held, the plaintiff might redeem on paying the sum loaned, with interest and costs.[1] So where it is stipulated that the whole debt shall become due upon failure to pay an instalment, the agreement is in the nature of a penalty, and equity will relieve on payment of the instalment, with interest and costs.[2] And the distinction is made, that an agreement, that the rate of interest shall be raised if not punctually paid, is treated as a *penalty*, and will be relieved against, even in case of gross default. But an agreement, that on punctual payment the interest shall abate, will be sustained, if strictly performed; not otherwise.[3] And the agreement for an abatement of interest will not be defeated by a single breach of it, unless the terms require this construction. Thus, in the case of Stanhope *v.* Manners,[4] it was agreed, that *as often* as the interest should be paid half-yearly on the appointed days, or within three months next after, a certain deduction should be made. The first half year's interest was not paid within the time, but the second, at the reduced rate, was tendered within the time, and refused. Held, the agreement was not annulled by the former failure, but the construction should be, that, *in every instance* where the tender was made in time, it should be accepted. But if the increased rate of interest is in consideration of *forbearance*, and not a part of the original agreement, and is of reasonable amount, it seems equity will not relieve. The forbearance is treated as equivalent to a *further advance*. Though interest cannot be converted into principal as against a subsequent charge, of which the mortgagee had notice.[5] So a stipulation, in a mortgage, that, upon failure to pay the interest, the mortgagee might

[1] Jennings *v.* Ward, 2 Vern. 520.
[2] Tiernan *v.* Hinman, 16 Ill. 400; Ferris *v.* Ferris, 28 Barb. 29. See Broderick *v.* Smith, 15 How. Pr. 434.
[3] Coote, 511, 512. See Marquis, &c. *v.* Higgens, 2 Vern. 134; Mayo *v.* Judah, 5 Munf. 495.
[4] 2 Ed. 199.
[5] Burton *v.* Slattery, 5 B. P. C. 233; Brown *v.* Barkham, 1 P. Wms. 652; Coote, 502. Acc. Haggarty *v.* Allaire, &c. 5 Sandf. 230.

treat the mortgage as due, bring an action upon it, and also claim damages, was held a valid agreement.[1] So an agreement, that the mortgagee shall have the use of the property instead of interest, is not usurious, unless such use amounts to more than legal interest.[2] And where a slave was mortgaged, and the mortgagee to have the increase, it was held that the agreement was not usurious, though such increase exceeded legal interest, if the mortgagee was to take as donee, and not on account of the loan, and this might be shown by parol evidence.[3]

25. But even if an agreement of this nature is valid, it is said, the intention of the parties to convert interest into principal must clearly appear; and, in general, by some writing under their hands. It is not enough that an account be stated between them.[4]

26. An agreement, subsequent to the making of the mortgage, between any one interested as mortgagee and the mortgagor or his assignee, to limit the right of redemption to any certain time, is held invalid. Thus a bill in equity for a foreclosure was brought by a mortgagee against the mortgagor, and his creditors, having an interest in the right of redemption. A decree being obtained, the defendant, one of the creditors, paid and took an assignment of the mortgage, and agreed with the other creditors, that they might redeem within a certain time. The defendant had possession twenty years, and the other creditors file a bill for redemption. Held, the plaintiffs stood in the confidential relation of mortgagor to the defendant; and the decree not being assigned to him, the agreement above mentioned was void, and the plaintiffs might redeem.[5]

27. The same general principle has been applied to the case of *a lease* from mortgagor to mortgagee, which is in the nature of a partial surrender of the equity of redemption. Thus the heirs of a mortgagor filed a bill against the heirs

[1] Huling *v.* Drexell, 7 Watts, 126; Ottawa, &c. *v.* Murray, 15 Ill. 336.
[2] Joyner *v.* Vincent, 4 Dev. & B. 512.
[3] Ibid.
[4] Coote, 502.
[5] Exton *v.* Greaves, 1 Vern. 138.

and executors of the mortgagee, to set aside a lease made by the mortgagor to the mortgagee, charging that it was made at a gross undervalue, and in consequence of threats of foreclosure. Upon two issues of law, ordered by the Court, the jury negatived both these averments. But Lord Redesdale subsequently decided, that the issues at law should not have been ordered, and set aside the lease as in its nature usurious and contrary to public policy, ordering the master to take an account of principal and interest, to charge the defendants with the rent up to the first day of payment after filing the bill, and add any sums paid for permanent improvements, with interest.[1] So where an absolute deed was given, with a parol agreement to reconvey upon payment of a certain sum; and subsequently the grantee leased to the grantor, and, in order to conceal the true nature of the transaction, and destroy the right of redemption, covenanted to reconvey to the grantor on payment of a certain sum of money by a specified time; and, after this time had elapsed, he conveyed to a third person having notice of the defeasance: held, the transaction constituted a mortgage; that the release and covenant did not impair the relation of the parties as mortgagor and mortgagee; and that the second grantee should reconvey to the morgagor on payment of the sum due in equity upon the mortgage. Bennett, J., said: — "When there is an attempt to set up such an instrument as an absolute conveyance, there is a fraudulent application or use made of it; and this is a proper ground upon which chancery may proceed." [2]

28. Upon the same general principle, where a mortgagee obtains the renewal of a lease or any other advantage in consequence of his mortgage, the mortgagor, upon redemption, is entitled to the benefit of it.[3] (*g*) "The law does not

[1] Gubbins *v.* Creed, 2 Sch. & Lef. 214.

[2] Wright *v.* Bates, 13 Verm. 341, 349.

[3] Slee *v.* Manhattan, &c. 1 Paige, 48; Coote, 429.

(*g*) The general principle stated in the text has been applied in favor of a mortgagee, as well as a mortgagor. Thus, if the mortgagor allow the land

permit the mortgagor to be *tolled* of his equity of redemption by such a shift." [1] Thus the plaintiff assigned to the defendant, as security for a debt, the lease of a farm. Subsequently, a contract was made, by which the plaintiff, in consideration of a sum expressed but not paid, agreed to give up to the defendant half of the farm, and the defendant took possession, surrendered the lease to the landlord, and took a new lease. Held, the plaintiff might redeem the whole premises, and have the entire benefit of the new lease.[2]

29. Upon a similar principle, where a mortgagor's estate has been sold on execution, while he was in possession, a subsequent mortgagee cannot overreach the purchaser's right of redemption by an absolute release to him from the mortgagor, and buying in an old incumbrance; but the estate will be charged with the actual expense of buying in such incumbrance.[3] (*h*)

[1] Per Bennett, J., Wright *v.* Bates, 13 Verm. 350.

[2] Holridge *v.* Gillespie, 2 Johns. Ch. 30.

[3] Miami, &c. *v.* Bank, &c., Wright, 249.

---

to be sold for taxes, and buy it, the mortgagee has the benefit of the title. Fuller *v.* Hodgdon, 25 Maine, 243.

(*h*) An execution in favor of a bank was levied upon certain slaves of the debtor, who, being about to satisfy it by payment of the notes of that bank, — worth only fifty per cent. of their par value — was prevented from doing so by the representations of a third person, that such payment would not be good. The latter, however, by an agreement with the debtor, paid the execution in this money, and took one of the slaves, with a condition of restoration in three months, upon repayment of the sum advanced. Upon a bill in equity, filed after the expiration of that time, the Court held the transaction was a mortgage, and decreed a redemption upon payment of one half the nominal value of the bank-notes by which the execution was discharged. May *v.* Eastin, 2 Port. 414.

A. assigned to B. a bond and mortgage given by C. (as security for debt.) A suit for foreclosure was brought by A. and B. against C., and at a sale on execution the land was bought by B. for a sum less than the original mortgage debt, and less than the debt from A. to B. Held, after payment of the debt due to B, he held in trust for the benefit of A. Hoyt *v.* Martense, 16 N. Y. (2 Smith), 231.

On the day of a sale on execution, the plaintiff and defendant executed

30. In the case of Price *v.* Price,[1] the conveyance was in in form absolute, but the real consideration was a sum of money paid to the creditors of the grantor. Upon a bill filed for reconveyance, the grantee claimed the benefit of the securities as mortgagee. The Court held, that he had mixed up the characters of trustee, mortgagee, and agent, and decreed an account without allowing interest on either side ; and though a small balance was found due him, yet on further directions the Court refused to allow him interest on it, and decreed a reconveyance and payment of the balance then become due from him, and, he having lost some of his vouchers, refused him the costs of taking the account.

31. The following case, somewhat remarkable and notorious for the amount of property involved, the length of time and variety of forms in which it was litigated, and the learn-

[1] 15 L. J. Chanc. 13 N. S.

---

a written agreement, under which the plaintiff agreed to purchase in the property, and to reconvey that, and other property bought by him at similar sales, to the defendant. Held, this was only a temporary privilege to the defendant, and the plaintiff did not hold the lands as mortgagee. Price *v.* Evans, 26 Mis. 30. One joint tenant sold the land, and took a mortgage for the purchase-money, and afterwards proceeded to a judgment, and sale of the mortgagor's rights on the mortgage, and purchased the premises himself. Held, this did not give him a new title on his own account. Jack *v.* Woods, 29 Penn. 375. A religious society was desirous of purchasing a lot of land, but the owner was unwilling to sell it to them ; and thereupon A., one of the trustees, purchased the land on his own account, giving back a mortgage for the purchase-money. Afterwards A. sold it to the society, and took back from them a mortgage. A.'s mortgage to the vendor not being paid, A. foreclosed the mortgage to himself, and at the sale bid the premises in himself, and afterwards died. The vendor assigned to B. the mortgage given to him by A., who was proceeding to foreclose the same, when the society applied for an injunction, and prayed that the mortgage from them to A. might be declared void, or they be let in to redeem, and for other relief. Held, that A. had a right to purchase the land from the original vendor ; that he was not acting as trustee for the society, and that the foreclosure by A. of his mortgage from the society was valid, and a bar to their right of redemption. South, &c. *v.* Clapp, 18 Barb. 35.

ing and ability displayed in its discussion and adjudication, serves to illustrate many of the topics considered in this chapter.

32. On or about June 13, 1823, one Frye, as guardian, by license of Court, conveyed certain lands to Luther Richardson, who, on the 14th of May, 1825, quitclaimed them, subject to incumbrances, to Prentiss Richardson, his brother, upon a secret parol trust for himself. May 6, 1826, the two Richardsons, with the wife of Prentiss, for the nominal consideration of $2,000, quitclaimed to Walker and Fisher, who gave back a bond for $10,000 to Luther, reciting that he had quitclaimed to the obligors, and stipulating to reconvey to him whenever, within five years, he should repay what they expended in discharging incumbrances and making improvements. At the same time, they leased to him a part of the land for five years, for the annual rent of one cent, unless there should be a previous redemption, agreeably to the bond. On or before May 13, 1831, the land was claimed by Frye's heirs, upon the ground of an invalidity in the guardian's sale. Soon afterwards, the plaintiff and Mann, one of the defendants, agreed by parol to purchase at their joint expense, and for their joint use, the title of Luther, and to extinguish the claims of Walker and Fisher, and of the Frye heirs, on their equal and joint account; which agreement was never abandoned. May 13, 1831, the plaintiff and Mann, in pursuance of this agreement, received a quitclaim deed from Luther, and an assignment of the bond from Walker and Fisher. July 27, 1831, Walker and Fisher quitclaimed to Mann alone; and afterwards the Frye heirs quitclaimed to Adams. August 6, 1831, Mann and Adams severally quitclaimed to each other one moiety of the premises and of their respective interests therein. August 8, 1831, Mann quitclaimed his moiety to Fuller for $40,000, and Fuller mortgaged back to Mann, as security for four notes of $10,000 each, given for the price. The plaintiff brings a bill in equity, to set aside the deeds of Mann to Adams and to Fuller, as a fraud upon the plaintiff, and for a recon-

veyance of one moiety of the premises to the plaintiff, upon payment by him of a moiety of the sums paid in perfecting the title. Held, the deed to Walker and Fisher and their accompanying bond, being parts of the same transaction, were to be treated as if contained in one instrument; and being in reality designed for security, and showing an attempt to evade the law relating to mortgages, constituted an equitable mortgage to Walker and Fisher for their advances, and not a conditional purchase, which requires a sale for valuable consideration; that this construction was fortified by the fact, that the grantees were not to have immediate possession, and that a fair price for a purchase of the land was not paid; that Luther, when he conveyed to Flagg and Mann, had an equity of redemption sufficient in a court of equity to make the parties tenants in common, and create between them a privity of title and estate; and a decree for relief of the plaintiff was passed, having reference to the respective rights and liabilities of the several defendants, as depending upon their various interests in the property, according to the above statement.[1]

33. Substantially the same rules have been applied to the conditional assignment of a mortgage itself, which have been stated above, as established for the protection of mortgagors against any restriction of the right of redemption. Thus there was an assignment of a mortgage, provided, that, if certain receipts shall amount to $300, the assignee shall reassign, and account for the excess above that sum; if they fall short of such sum, and unless the assignor in one week pay the deficiency, the assignment to be absolute. The receipts were less than $300. Held, equity would decree a redemption upon making up this sum, the transaction being a mortgage or pledge, not a conditional sale.[2] So in the case of Clark *v.* Henry,[3] the plaintiff was indebted to the defendant upon promissory notes for $225, and executed to him an assignment, in terms absolute, of a mortgage held by

[1] Flagg *v.* Mann, 2 Sumn. 486.
[2] Solomon *v.* Wilson, 1 Whart. 241.
[3] 2 Cow. 324, 331; S. C. 7 Johns. Ch. 40.

the plaintiff against one Davis, for $1,065.03. The notes were destroyed by the parties, and the defendant gave the plaintiff a written agreement to sell him the mortgage, if he would pay the defendant $225 by a certain day. Several times previous to this day the defendant declared that he held the assignment as security for his debt. Payment not being made at the day, the plaintiff brings a bill in equity to redeem. Held, the assignment was not a conditional sale, but a mortgage; and the plaintiff entitled to redeem, upon payment of the $225, and interest. In giving the opinion of the Court, Woodworth, J., remarks:[1] — "The case warrants the inference, that Clark supposed the papers were so drawn as to defeat the right of redemption, if there was a failure of payment, and that the word 'sell' was inserted, instead of the more appropriate term reassign, so as thereby to obtain a mortgage of $1,065 for the inadequate consideration of $225. The whole operation seems to be devised for the purpose of overreaching an ignorant man who could neither read nor write. There cannot, however, be any doubt that the writing executed by the appellant was *per se* a defeasance merely. On what terms was the appellant to sell? Not for the value of the security, but for the amount of the original debt, not equal to one fourth of the mortgage. This speaks a language not to be mistaken. The instrument must be construed as a covenant to reassign."

[1] 2 Cow. 331.

CHAPTER V.

CONDITIONAL SALE, AS DISTINGUISHED FROM A MORTGAGE.

1. There is a certain description of conveyance, similar in form to a mortgage, but to which the rule against restricting the right of redemption is not applicable; to wit, *a sale with an agreement to repurchase*, or, as it is usually termed, *a conditional sale.* (*a*)

2. "A mortgage and a conditional sale are nearly allied to each other. The difference between them is, that the former is a security for a debt, and the latter is a purchase for a price paid, or to be paid, to become absolute on a particular event; or a purchase accompanied by an agreement to resell upon particular terms. The only difficulty is, to ascertain the character of the transaction. When it is once determined to be a mortgage, all the consequences of account, redemption, and the like, follow, notwithstanding any stipulation to the contrary. For the power of redemption is not lost by any hard conditions; nor shall it be fettered to any point of time, not according to the course of the Court." [1]

3. Various circumstances have been resorted to, for the purpose of determining whether a particular conveyance should fall within one or the other of these classes. The precise language used is generally held of little consequence. Thus, the words "redeem," (*b*) "repurchase," &c., may have

[1] Per Ruffin, J., Poindexter *v.* McCannon, 1 Dev. Eq. 375, 376.

(*a*) The civil law recognized the distinction between mortgages and conditional sales. 2 Story's Eq. § 1019.

(*b*) In the case of Robinson *v.* Cropsey, 2 Edw. Ch. 138, a transaction

one or another signification, according to the circumstances of each case. (*c*) The relative situation, and the precedent, accompanying, and subsequent acts of the parties are regarded as of much more importance. The leading incidents of a mortgage are these: the relation of debtor and creditor, (*d*)

---

was held to be a conditional sale and not a mortgage, although there was an express agreement that the vendor might *redeem* by paying a certain sum in one year, and the cost of intermediate improvements, if any, upon the buildings; but, if there should be no sale, that he should not have the use of the farm; upon the ground, that it was evident from the whole transaction, that the parties intended an entire discharge of the debt, which fully equalled the value of the land at that time. By a singular but probably legitimate construction, an express agreement, that there shall be *no right of redemption* beyond a fixed time, has been regarded as one mark of a mortgage; the agreement being invalid *as such*, but effectual to show the nature of the transaction. Murphy *v.* Calley, 1 Allen, 109. In the case of Chambers *v.* Hise, 2 Dev. & Bat. Eq. 305, the plaintiff brought a bill in equity to redeem certain negroes, transferred by him to the defendant by a common bill of sale, with this condition: "If the said Jacob Hise is not satisfied with the said negroes, or if the said negroes are not satisfied with the said Hise, then the said Chambers has privilege and authority to *redeem* the said negroes, at any time that he shall pay or cause to be paid to the said Jacob Hise the $300, or a negro girl to the satisfaction of the said Hise." The subscribing witness deposed, that the parties intended only what appeared on the face of the instrument; and there was no evidence that the transaction was a loan. It was held by the Court, that the paper was not on its face a mortgage, and, there being nothing else shown in the case to make it one, that the bill should be dismissed.

(*c*) An agreement by a purchaser, subsequent to the deed, to resell at the same price in a certain time, does not make the transaction a mortgage. Mason *v.* Moody, 26 Miss. 184.

(*d*) Upon this point, the following remarks of the Court in a late case in New Hampshire are suggestive, and worthy of consideration, although the general rule to which they tend can hardly be considered as the one established by the weight of authority: — "Early definitions of mortgages are found, where no other conditional conveyances are regarded as mortgages, but such as are made for the security of a loan of money. At another date, we find the equitable doctrines as to mortgages extended to all cases where the conveyance is a security for any debt, and the most modern notion is to apply the same doctrines to cases generally, where conditional deeds are

and the continuance of a debt between them; retaining of possession by the grantor; in a doubtful case, great excess of value in the property over the consideration paid; — although this has been held not of itself to raise the presumption of a mortgage. On the other hand, the necessitous condition of the grantor; the connection of a third person with the transaction; (*e*) the reservation of a power, on the part of the grantor, to annul the bargain, or to the grantee of a right to buy the land absolutely; (*f*) the lapse of a long pe-

---

made as a security for the performance of a contract. But upon consideration it will be seen that this principle, though generally true, can have no application to any other contracts than such as by their non-performance create a debt, or a demand in nature of a debt, against the delinquent party. Whenever the condition, when broken, gives rise to no claim for damages whatever, or to a claim for unliquidated damages, the deed is not to be regarded as a mortgage in equity, but as a conditional deed at common law. It has the incidents of a mortgage only to a limited extent, and the party, if relieved by a court of equity from the forfeiture resulting from the non-performance of the condition, will not be relieved as in cases of a mortgage." Per Bell, C. J. Bethlehem *v.* Annis, 40 N. H. 39, 40. Conformably with these views, a deed conditioned for the *support* of the grantee was held not to be mortgage, but a conditional sale; not assignable, although not, on the other hand, involving a strict forfeiture for breach of condition. Ibid. 34.

(*e*) In the case of Perry *v.* Meddowcroft, 4 Beav. 197, the purchase-money of an estate was paid by a third person on behalf of the purchaser, and a further sum advanced, with an agreement that the deed should be made to the third person, and, if the purchaser repaid the money with interest by a certain day, the agreement to be void; otherwise the sale was thereby absolutely confirmed to the other party. Held, a conditional purchase.

(*f*) Land was conveyed by an absolute deed, and on the same day a covenant executed by the grantee, reciting that the deed was given for the purpose of paying a specified sum, and agreeing not to transfer the land within one year without the grantor's consent, and if the latter should within that time find a purchaser, he would convey to him, on receiving the sum, with interest, for which the land had been conveyed to him; and if such sale should not be made within the year, it should be left to certain persons to determine what further sum he should pay the grantor for the land, which sum he covenanted to pay. The grantee brings ejectment against the grantor for the land. Held, the conveyance was not a mortgage, and the action could be maintained. Baker *v.* Thrasher, 4 Denio, 493.

riod before any claim to redeem; (*g*) the approximation of the consideration paid to the cash value of the property; (*h*) the surrender of personal securities; (*i*) or the absence of any agreement to repay the purchase-money, (*j*) making the

(*g*) As where there was an absolute deed, and a writing back, giving the right to repurchase within three years, and more than half the period of the statute of limitations elapsed without any attempt to redeem. More especially will redemption be denied in such case, where the securities are given up, a full price paid, and the grantee has apparently in good faith sold the land. Mellish *v.* Robertson, 25 Verm. 603.

(*h*) In the case of Williams *v.* Owen, 10 Sim. 386; 5 M. & Cr. 306, an estate was conveyed absolutely in consideration of £550, (the value of the property,) and an agreement given back, that, if the grantor repaid this sum and the cost of the conveyance within a year, the grantee would reconvey, having his option either to retain the intermediate rents or to receive interest. Held, a conditional sale.

After two successive mortgages to different persons, the mortgagor conveyed in fee to the first mortgagee. The deed recited, that the debt of the grantee was due, and that the mortgagor had agreed to convey to him absolutely, subject to the payment by the grantee of the second mortgagee's debt. This debt was accordingly paid. The grantor took back an agreement from the grantee, that, upon the grantor or his heirs paying the grantee or his heirs, at the end of two years, the sum named in the deed, the grantee or his heirs would convey to the grantor. It was further expressed, that the grantor should pay the grantee one hundred and twenty-five dollars per year. Two months afterwards, the grantor executed the following release: "All my right and claim in, &c., that I have deeded to, &c., and I give him possession," which was taken by the grantee. The right of redemption was worth from fifteen hundred to two thousand dollars, and the purchase made for sixteen hundred dollars. No compulsory measures were taken or threatened by the grantee against the grantor. No covenant or obligation remained on the part of the grantor. Held, a conditional sale. Hicks *v.* Hicks, 5 Gill & J. 75.

(*i*) In the case of Holmes *v.* Grant, 8 Paige, 243, a debtor conveyed his farm to his creditor for the amount of the debt, which was about the value of the farm, by a warranty deed, and the grantee surrendered and discharged his securities for the debt, and the same day gave the grantor a written agreement, that, if the grantor could find a purchaser for the farm within one year, he might have all he could obtain beyond the debt, with interest. It was held, that this transaction was not necessarily a mortgage, even though the agreement were given simultaneously with the deed, and in virtue of a previous bargain therefor.

(*j*) This fact is held not to be decisive. Russell *v.* Southard, 12 How.

grantor's right to repurchase, and the grantee's right to recover the price, mutual and reciprocal;—(*k*) are circumstances which favor the construction of the transaction as a conditional sale.[1] (*l*) The question as to the nature of the con-

[1] Slee *v.* Manhattan Co. 1 Paige, 56; Glover *v.* Payn, 19 Wend. 518; Poindexter *v.* McCannon, 1 Dev. Eq. 373; Bacon *v.* Brown, 19 Conn. 29; Robinson *v.* Cropsey, 2 Edw. 146; Wright *v.* Bates, 13 Verm. 350; 3 Atk. 278; Holmes *v.* Grant, 8 Paige, 243; 2 Barb. 28; Goodman *v.* Grierson, 2 Ball

---

139. The promise may be a parol one. Hills *v.* Elliot, 16 Mass. 33. See Scott *v.* Britton, 2 Yerg. 215.

(*k*) In Goodman *v.* Grierson, 2 Ball & B. 274, it was held by Lord Manners, that, where the trustees of a settlement of £1,000 portion, charged on estates, accepted part of the estate "in lieu and satisfaction" of the £1,000, with power for the owner of the estate to reassume the premises at any time within ten years, on payment of that sum; the transaction was a conditional sale, because the trustees had no remedy for the deficiency, if the estate proved insufficient.

Where the owner of land conveyed it, in order that the grantee might be able to sell it, account with the grantor for a certain sum, and retain the balance for his services; and afterwards the grantee reconveyed, provided that if he paid the grantor the sum above mentioned the deed should be void; the transaction was held not a mortgage, but a conditional sale. In this case, the Court remark: "Turner was the mere agent of Porter to sell the land, and was to have for his trouble what he could obtain above two thousand dollars. There was no debt due from Turner to Porter for which the land was put in pledge. Turner had undertaken to do no act for the performance of which the land was mortgaged. Turner was to be the purchaser in case he could sell, and in that case alone." Porter *v.* Nelson, 4 N. H. 130. In Baxter *v.* Willey, 9 Verm. 276, it appeared that the defendant executed to the plaintiff the promissory note upon which the action was founded, with two others, and conveyed to him certain land in Canada, but did not take up the notes; that the plaintiff then gave back to the defendant a writing, stating that the deed was made in payment of these notes, but agreeing to reconvey, if at the end of two years the defendant would pay the amount of the notes with interest. This writing was transferred to others for a valuable consideration, and had since been lost. The defendant was to retain possession during the two years. Evidence was offered, that the plaintiff had acknowledged the notes were paid. Held, the action could not be maintained, because, by the laws of Canada, the defendant would have no equity of redemption in the land.

(*l*) The relation of *landlord and tenant* is consistent with that of mort-

veyance is a question of fact and intent for the jury.[1] Though it is sometimes held that parol evidence is not admissible to convert a mortgage into a conditional sale.[2]

4. Gibson, Ch. J., says:[3] "It is too late to say that what was intended to be security for a loan may become a conditional sale by the accidental form of the transaction; or, that an agreement to make it such, in default of payment at the day, shall not be relieved against, or that a jury are not the proper judges of the intention, or that a purchaser, with a part of the purchase-money in his hands, may be protected beyond reimbursement."

5. A sale with an agreement to repurchase, though narrowly watched, is construed like any independent agreement

& B. 274; Conway *v.* Alexander, 7 Cranch, 218; Dougherty *v.* McColgan, 6 G. & Johns. 275; Coles *v.* Perry, 7 Tex. 109; Russell *v.* Southard, 12 How. 139; Streator *v.* Jones, 3 Hawks, 423; Hopkins *v.* Stephenson, 1 J. J. Marsh. 341; Oldham *v.* Halley, 2 J. J. Marsh. 113; Edrington *v.* Harper, 3 J. J. Marsh. 353; Robinson *v.* Farrelly, 16 Ala. 472; Galt *v.* Jackson, 9 Geo. 151; Hoopes *v.* Bailey, 28 Miss. 328; Bayley *v.* Bailey, 5 Gray; 505; Davis *v.* Stonestreet, 4 Ind. 101; Stomey *v.* M'Murray, 27 Mis. 113; Jones *v.* Jones, 1 Head. (Tenn.) 105.

[1] Gaither *v.* Teague, 7 Ired. 460; Kunkle *v.* Wolfersberger, 6 Watts, 131; Page *v.* Foster, 7 N. H. 392; Mason *v* Moody, 26 Miss. 184; Williams *v.* Bishop, 15 Ill. 553.

[2] Woods *v.* Wallace, 22 Penn. 171.

[3] Kunkle *v.* Wolfersberger, 6 Watts, 131.

---

gagor and mortgagee. Hence a lease does not change a mortgage to a conditional conveyance. Kunkle *v.* Wolfersberger, 6 Watts, 131. An agreement for future reconveyance at an advanced price, at the election of the grantor, is no evidence of a mortgage. Glover *v.* Payn, 19 Wend. 518. Where all the clauses of an instrument are consistent with a conditional sale, but some inconsistent with a mortgage, it will be construed as being the former, and not the latter. Thus, where the agreement, after stating the receipt of a certain sum, used the words, — "and put a negro in his hands as security;" and also the following words, "if the money is not paid at or before, &c., the said, &c., is to have the said negro for the said" sum; it was held to be a conditional sale, because the former words might have full effect by construing the sale defeasible till the time named, while the latter could have no effect, unless after that time the sale became absolute. Chapman *v.* Turner, 1 Call, 251. A grantor bound himself in a large sum, as liquidated damages, to procure a release of dower, and afterwards wrote a letter to his wife, requesting such release. Held, these facts did not disprove a mortgage. Russell *v.* Southard, 12 How. 139.

between strangers, and the right of redemption restricted to the time appointed.[1] So, also, the title passes to the vendee, and he has the intermediate rents and profits.[2]

6. It seems to be the general rule, that equity will construe a conveyance as a mortgage rather than a conditional sale, if the language used and the circumstances of the case will admit such construction.[3] But, on the other hand, the reasonable rights of the grantee will be protected. Thus, in Floyer *v.* Lavington,[4] Lord Chancellor Cowper remarked, that this Court had heretofore gone too far in permitting redemptions. In the same case, he further remarked,[5] that here several circumstances concurred, which, though each of them singly might not be of force to bar the redemption, yet all of them joined together were strong enough to prevail over it. So Chief Justice Marshall says:[6] "If the vendee must be restrained to his principal and interest, that principal and interest ought to be secure." "To deny the power of two individuals, capable of acting for themselves, to make a contract for the purchase and sale of lands defeasible by the payment of money at a future day, or, in other words, to make a sale with a reservation to the vendor of a right to repurchase the same land at a fixed price and at a specified time, would be to transfer to the Court of Chancery, in a considerable degree, the guardianship of adults as well as of infants." So it is said, if parties intend an absolute sale, a contemporaneous agreement for a repurchase, not acted upon, will not, of itself, entitle the vendor to redeem.[7] And, in another case, — "As on the one hand no act of a scrivener can turn that which was intended as a mortgage into an absolute sale; so, on the other, it must not be permitted to designing men to turn a real, though defeasible sale into a

[1] 4 Kent, 143, 144; Eaton *v.* Green, 22 Pick. 529, 530; Turnipseed *v.* Cunningham, 16 Ala. 501; Scott *v.* Henry, 8 Eng. 112. See Crane *v.* Bonnell, 1 Green, Ch. 264; Ketchum *v.* Johnson, 3, 370; King *v.* Newman, 2 Munf. 40; French *v.* Lyon, 2 Root, 69.

[2] Bennet *v.* Holt, 2 Yerg. 6.

[3] See 4 Kent, 143.

[4] 1 P. Wms. 270.

[5] Ibid. 272.

[6] Conway *v.* Alexander, 7 Cranch, 237.

[7] Per Lord Cottenham, 5 M. & C. 306.

mortgage, without the free consent of the other contracting party."[1] So, in the case of McDonald *v.* McLeod,[2] Gaston, J., remarks: "It is not questioned but that a deed, absolute upon its face, may be shown by extrinsic facts to have been executed as a security for the payment of money, and to have put on the form of an absolute deed by reason of the ignorance of the draftsman, or from mistake of the parties, or because of undue advantage taken of the necessities of the debtor. In examining transactions between borrowers and lenders, and between necessitous men and their creditors, courts of equity, aware of the unequal relation of the parties, and of the facility by which the former may be surprised into improvident arrangements, and of the moral coercion which the latter can exercise over their apparent freedom of action, are particularly attentive to any circumstances tending to show an inconsistency between the form of an act, and the intent of the parties, and will take great pains, when their suspicion is thus excited, to get at the substance of what was done or intended to be done by them. But, unquestionably, it is a conclusion of reason, and therefore must be the presumption of every Court, that solemn instruments between parties able to contract, declare the truth in regard to the subject-matter of their contract, until error, mistake, or imposition be shown." (*m*)

[1] Per Roane, J., Chapman *v.* Turner, 1 Call, 250.

[2] 1 Ired. Eq. 226.

(*m*) Upon these grounds it was held, in the above case, 1 Ired. Eq. 221, that where the instrument was an absolute bill of sale, (of a slave,) and the sum paid not greatly disproportionate to the value, and it did not appear that the agreement, for restoring the slave to the seller upon repayment of the price, was made before or at the time of the execution of the bill of sale, and the purchaser had refused to take a mortgage, and seven years had elapsed without any claim by the seller; the transaction should not be treated as a mortgage, nor the seller allowed to redeem.

Lands to which A. had a right of preëmption, and of which he had possession, were by his request conveyed by the government to B., who paid the

7. The doctrine of a conditional purchase has been particularly applied to conveyances by way of *rent-charge;* in regard to which it is suggested, that, unless it were settled that the estate of the grantee becomes absolute on breach of condition, the property would be very precarious; for if, after the term agreed upon, the estate were redeemable, it would be only a personal estate; but if considered as absolute, it would be a freehold, and must be conveyed as such, which would create great confusion.[1] In this class of cases, moreover, the absence of any covenant to pay the debt is relied upon, as a ground for restricting the right of redemption to the time limited in the deed. In some of them, also, the lapse of time has been an additional reason for refusing relief. Thus, in Floyer *v.* Lavington,[2] a rent-charge was granted, upon condition that the grant should be void upon the grantor's making certain payments during his life. There was no covenant to pay; the rent-charge was much less than the interest of the money, and the grantee had conveyed the rent-charge, after the grantor's death, given a collateral security to the purchaser for quiet enjoyment, and the purchaser had afterwards made a marriage settlement of it. Held, after sixty years the right of redemption was gone. So Thomas Mellor mortgaged to the Whiteheads, and the latter to Cartwright for £200, Thomas and his son joining in the latter mortgage. To secure the interest, Cartwright leased to the son for five thousand years, at the rent

[1] 1 Pow. 130. [2] 1 P. Wms. 268.

---

price, and agreed with A. that on payment of a certain sum within a certain time he would convey to him. B. afterwards wrote letters to A., which might be construed to treat the transaction as a mortgage, but were not so construed. A written agreement was subsequently made, reciting the title of B., and providing for a sale by him, and that he should account for a certain surplus of the proceeds with A. The time having expired, B. sold to C., with notice. Held, not a mortgage, and that A. had lost all title to the land. Wynkoop *v.* Cowing, 21 Ill. 570.

of £12 per annum for the first three years, and £10 the remainder of the term; and if the £200 and interest were not paid in three years, the land to be reconveyed. Receipts were given, sometimes as for interest, and sometimes for a rent-charge. The last receipt was about forty years subsequent to the lease. Ten years after this receipt, a bill to redeem was brought by the grandson of Thomas, the estate having nearly doubled in value since the mortgage. Held, it could not be sustained.[1] So in the case of Davis *v.* Thomas,[2] the plaintiff mortgaged certain property to Twyning for £1,200, and afterwards borrowed £200 more on the same security. In the same year, the plaintiff executed a deed of release, for a valuable consideration, of the equity of redemption, to the defendant, the mortgagee. Soon afterwards, the defendant demised the premises to the plaintiff for ninety-nine years, at a rent of a hundred guineas a year; and upon the lease was indorsed an agreement signed by the mortgagee, that if the plaintiff regularly paid the rent due at Lady-day by the 4th of June, and the rent due at Michaelmas by the 26th of October, he might repurchase the premises for £1,850 at any time within five years; but if default were made in payment of the rent within those periods, the agreement to be void. The plaintiff failed in such payment, and distresses were made for the rent; but within five years he applied to repurchase, and tendered the arrears of rent. The defendant refused to resell; and the plaintiff files a bill to have the benefit of the agreement or be let in to redeem. The bill imputed fraud to the defendant, and represented the estate as having been in 1820, the date of the release, worth about £3,000, but those allegations were not proved. Lord Chancellor Brougham decided, that the instruments above referred to did not all constitute one transaction, the party having first mortgaged his estate, two years afterwards conveyed it, and three months subsequently, upon obtaining a lease from the purchaser, procured to be indorsed upon the lease,

[1] Mellor *v.* Lees, 2 Atk. 494.

[2] 1 Russ. & My. 506.

by way of indulgence, a power to repurchase on certain terms; that, as the party acted understandingly and used the most stringent words to make time of the essence of the contract, he did not come in due time or entitle himself by his conduct to the benefit claimed by him.

8. But in Verner *v.* Winstanley,[1] one of the plaintiffs, having become embarrassed, applied to the defendant for a loan of £300, for which he should take an assignment of a rent-charge of £50 per annum. The assignment was accordingly made, with a covenant, that the plaintiff might at any time repurchase and reassume the rent-charge, on giving three months' notice, and paying £350 and all arrears. The plaintiffs also gave their joint and several bond to the defendant in the sum of £700, conditioned to pay £350 in about eight months, and also for the regular and punctual payment of the rent-charge. Held, the assignment was a mortgage; partly upon the ground of the clause for redemption, and the additional sum of £50 to be paid by the plaintiff; but chiefly because the defendant did not take on himself the whole risk of the annuity, but received the security of the bond.

9. A written agreement to reconvey, upon repayment of the consideration named in the deed, unsealed, and therefore insufficient to constitute a legal mortgage, makes *an equitable mortgage*, and not a sale with the right to repurchase.[2]

10. The following distinction has been made between mortgages and conditional sales, in reference to the evidence by which they may be respectively proved. "A formal conveyance may certainly be shown to be a mortgage by extrinsic proof, while a formal mortgage may not be shown to be a conditional sale by the same means. In the one case, the proof raises an equity consistent with the writing, and in the other would contradict it."[3]

11. It has been sometimes suggested, that, even where a transaction is construed to be not a mortgage, but a condi-

[1] 2 Sch. & Lef. 393.
[2] Eaton *v.* Green, 22 Pick. 526.
[3] Per Gibson, C. J.; Kunkle *v.* Wolfersberger, 6 Watts, 130.

tional sale, equity will still afford relief against the strict enforcement of the contract between the parties. And this principle was distinctly laid down in a late case of a deed conditional for the *support* of the grantee.[1] Upon this subject, the following remarks have been made: "It is contended for the defendants, that even should this be considered a conditional sale and not a mortgage or security for a subsisting debt, yet a court of equity may relieve against a forfeiture for a breach in failing to repay the money in time, because compensation can be made, and under the circumstances relief ought to be granted. It is a familiar head of equity jurisdiction to relieve against a forfeiture or penalty upon the principle of making compensation. But the present is not a case of forfeiture. The owner of the property sold his estate; and there is no proof of the price having been inadequate. He made it a part of his contract — and I must presume the price was fixed with reference to the event — of having the privilege of redeeming, or, which is the same thing, repurchasing, within one year, by paying a certain amount of money. Time consequently was of the essence of the contract; and performance necessary to regain the estate with which, by his voluntary contract, he had parted; not that non-performance works a forfeiture and divests a title and estate already in him. In such cases, equity does not interfere; because it would be varying the express terms of the contract, and giving to the party a benefit of extension in point of time, for which he has not stipulated. No fraud, accident or mistake is charged as a cause of his not having availed himself of the privilege within the time appointed."[2] (*n*)

[1] Bethlehem *v.* Annis, 40 N. H. 34.

[2] Per McCoun, V. Chanc., Robinson *v.* Cropsey, 2 Edw. 147.

(*n*) The following form of decree was passed by the Court in Pennsylvania: "If the said John Mortimere refunds to said Rankin the consideration-money aforesaid, with lawful interest thereon, in one year from this date, then this deed to be void and of no effect, and this not to be con-

sidered in the nature of a mortgage, but an express stipulation to pay on the particular day, and if not then paid, the estate and title shall be absolute, without any further deed, transfer, or proceeding whatever." Rankin *v.* Mortimere, 7 Watts, 372. And the general rule may be laid down, that the condition must be *strictly* complied with, to entitle the grantor to a reconveyance. Hoopes *v.* Bailey, 28 Miss. 328. In a bill to redeem, where the deed is a conditional sale, if the bill allege that it was given as security, it will on demurrer be considered a mortgage. Blakemore *v.* Byrnside, 2 Eng. 505.

CHAPTER VI.

PERSONAL LIABILITY OF THE MORTGAGOR, ETC.

1. Personal liability of the mortgagor; whether necessary to constitute a mortgage; whether the deed itself creates such liability, &c.
26. Mortgages for *support and maintenance*, &c.
28. *Covenant* or *condition* for payment of the debt, how construed. Covenants *for title* in a mortgage. Mutual relation and effect of the covenants in the deed and the mortgage. *Estoppel, Rebutter*, &c.

1. In England, it would seem that a mortgage often, if not usually, contains, in addition to the *conditional* clause, a *covenant* to pay the sum which the conveyance is designed to secure to the grantee. In the United States, such covenant is, for the most part, omitted in the deed itself; but the proviso of the deed refers to a bond, note, or other personal security, made at the same time, upon the payment of which, both the mortgage and the personal security are to become void. Of course, either a covenant in the deed, or a separate obligation accompanying it, makes the mortgagor personally liable for the debt, at the election of the mortgagee; and it will be seen hereafter, that the latter may pursue his remedies upon the personal security and the mortgage, at the same time, though he can eventually have but one satisfaction of his claim. In the absence of any covenant in the deed, or personal obligation accompanying it, two questions have been raised and much discussed; one relating to the nature, designation, and legal operation upon the property, of the conveyance; that is, whether it shall constitute a *mortgage* or a *conditional sale* (see ch. 5); the other, whether such a conveyance will, of itself, give to the grantee a personal claim and remedy against the grantor, for the sum of money therein referred to. In connection with the same subject, has also, at times, arisen the question,

whether, in order to constitute a *mortgage*, strictly so called, the condition must be for the *payment of money;* and, where it is for the performance of other acts, in what precise mode and extent it is to be enforced by legal proceedings. From the nature of the case, these questions have all necessarily been somewhat blended together, in the remarks of judges and elementary writers, and, therefore, do not here require separate consideration.

2. Mr. Coote remarks,[1] that there is the same right of redemption, whether there be a covenant or not. Every loan implies a debt; though the covenant may serve to explain the transaction in a doubtful case, and prove it to be a mortgage. And the same author elsewhere remarks:[2] — "A mortgage cannot be a mortgage on one side only; it must be mutual; that is, if it be a mortgage with one party, it must be a mortgage with both. The reverse of this was formerly attempted to be established; namely, that it must be a mortgage with both or with neither; so that it was argued none could come to redeem, if the mortgagee could not compel the payment of the mortgage-money; but the former is the true principle. The mutuality, however, need not run *quatuor pedibus;* the rule only requires that it shall not be competent to one party alone to consider it a mortgage. In other respects the rights of the parties may be different, for it is every day's practice, that one party may not be able to foreclose at a time when the other may redeem."

3. In Ancaster *v.* Mayer,[3] Lord Chancellor Thurlow says: — "A man mortgages his estate without covenant, yet, because the money was borrowed, the mortgagee becomes a simple contract creditor, and, in that case, the mortgage is a collateral security." The same doctrine is laid down by him in the case of Floyer *v.* Lavington.[4] In King *v.* King,[5] Lord

[1] Coote, 50.
[2] Ibid. 61; acc. Com. Dig. Chancery, 4 A 3.
[3] 1 Bro. 464. See Bacon *v.* Brown, 19 Conn. 29; Lawrance *v.* Boston, 8 Eng. Law & Eq. 494; Ransone *v.* Frayser 10 Leigh, 592.
[4] 1 P. Wms. 268; acc. Yates *v.* Ashton, 4 Qu. B. 182; Allenby *v.* Dalton, 5 L. J. K. B. 312, (O. S.)
[5] 3 P. Wms. 358.

Talbot said, the absence of a covenant or bond did not vary the transaction; for that every mortgage implied a loan, and every loan implied a debt, for which the mortgagor's personal estate was liable; and although an action of covenant would not lie, still, it might be a mortgage. In Mellor *v.* Lees,[1] Lord Hardwicke says, the absence of a covenant is a strong circumstance to indicate the intention of the parties; but if that were the only circumstance, I should not rely upon it to defeat the plaintiff's right to redeem.

4. It has been held, that an acknowledgment by the mortgagor, in a separate deed, that the debt is due, if made solely for a collateral purpose, will not raise an implied covenant to pay; though, in general, this is the effect of an unequivocal acknowledgment.[2]

5. In Exton *v.* Greaves,[3] certain mortgaged premises, or the equity of redemption thereof, being subjected to the payment of divers debts, the mortgagee brings a bill for foreclosure against the mortgagor and all the creditors. At the time fixed for foreclosure, the defendant, a creditor, by consent of the creditors, paid the money, and agreed with the creditors, that if they would pay his money at a further day, they should redeem; otherwise, he should have the lands absolutely. They failed to do so, the defendant enjoyed the lands for twenty years, and laid out £800 in building; and now the creditors exhibit their bill to redeem him. It was contended for the defendant, that the case was not like a mortgage, for a mortgagee has a covenant for payment of his money, and most commonly, a bond; but here, the defendant had no way to compel the creditors to pay him his money; that a mortgage ought to be mutual; as one may compel to receive, so the other may compel to pay; and it would have been looked on as superfluous and fantastical for the defendant to have exhibited a bill to have foreclosed these creditors. But the Lord Keeper decreed a redemption, and directed an

[1] 2 Atk. 494.
[2] Courtney *v.* Taylor, 6 M. & G. 851.
[3] 1 Vern. 138.

account to be taken, and the defendant to be allowed only necessary repairs and lasting improvements.

6. In Goodman *v.* Grierson,[1] the father of the plaintiff, owning lands subject to a charge of £1,000 to his sister, the wife of Higgins, in 1788 conveyed to trustees for Higgins and wife, in lieu and satisfaction of the sum of £1,000; with a covenant for reconveyance, if the grantor, his heirs, &c., should, within ten years, pay the £1,000. Higgins entered. In 1797, the father of the plaintiff died, leaving the plaintiff his heir. Soon after, Higgins and wife died, and the defendant became entitled to the lands under the will of Higgins. In 1803, a tender was made to him of £1,000 on behalf of the plaintiff, which he refused; and in April, 1811, the bill was filed on behalf of the plaintiff, a minor, for redemption. It was held that the bill should be dismissed. Lord Chancellor Manners remarked:[2] — "If the intention were that it should be a mortgage, the absence of a covenant and collateral bond would not make it the less so. The fair criterion by which the Court is to decide whether this deed be a mortgage or not, I apprehend to be this, — are the remedies mutual and reciprocal? Has the defendant all the remedies a mortgagee is entitled to? I conceive he has not. Suppose, for instance, the defendants to file a bill of foreclosure; by the practice of this Court, the decree is for a sale of the mortgaged premises, if they be not redeemed within the time limited by the course of the Court. Suppose the sale to take place, and the produce to be insufficient to discharge the £1,000 and costs, how is the deficiency to be raised? What remedy could the defendant then have? If it were a mortgage, he, in that case, might proceed on his covenant or bond, or, if no covenant or bond, upon the implied assumpsit; but how could any action be maintained in this case, where the defendants have taken the conveyance, not as security, but expressly *in lieu and satisfaction* of the portion of £1,000. This appears to me decisive to show, that

[1] 2 Ball & B. 274. [2] Ibid. 278.

the transaction between these parties was not that of a mortgage, but a conditional sale; for if the defendants have not all the remedies of a mortgagee, why am I, contrary to the express provisions of this deed, to hold it to be a mortgage, and to extend the condition beyond the limit agreed upon by the parties to this deed? There would be much hardship and inconvenience to the one party, and there appears to me to be no substantial ground to entitle the other to relief."

7. The doctrine upon this subject, in this country, has been somewhat various and conflicting.

8. Several cases have occurred in the United States Courts.

9. In Conway *v.* Alexander,[1] the absence of a covenant was held to be strong, but not conclusive evidence of a *conditional sale.* In Morris *v.* Nixon,[2] it was held, that, where there was a previous conversation between the parties about borrowing and lending, an offer to secure by mortgage, and a bond given to the grantee; these circumstances were sufficient to make the deed a mortgage, though in form absolute, unless a subsequent bargain were proved. In Flagg *v.* Mann,[3] Judge Story remarked as follows: — "It is said, that there is no covenant on the part of Richardson to repay the money paid, which should be paid by Walker and Fisher, to discharge the incumbrances on the premises. But that is by no means necessary in order to constitute a mortgage, or to make the grantor liable for the money. The absence of such a covenant may, in some cases, where the transaction assumes the form of a conditional sale, be important, to ascertain whether the transaction be a mortgage or not; but, of itself, it is not decisive. The true question is, whether there is still a debt subsisting between the parties, capable of being enforced in any way, *in rem* or *in personam.* Now, it seems to me clear, upon admitted principles of law, that, upon the payment of the money due to Bennett by Walker

[1] 7 Cranch, 237. See Hickox *v.* Lowe, 10 Cal. 197.

[2] 1 How. 119.

[3] 2 Sumn. 534.

and Fisher, Richardson became their debtor for that amount, as it was paid at his request, and for his benefit. It is a common principle, that if A., at the request of B., pays a debt due by him to C., A. may recover the amount in assumpsit for money paid to his use, or for money lent and accommodated. In my judgment, that is the very case at bar." "It is said, that here there was no loan made or intended to be made, by Walker and Fisher to Richardson; and that they refused to make any loan. There is no magic in words. It is true, that they refused to make a loan to him in money. But they did not refuse to pay for him the amount due to Bennett, and to take the premises as their security for reimbursement within five years."

10. It has been held in Pennsylvania, that a conditional conveyance, without any covenant, may constitute a mortgage, upon which the sum due may be recovered by *scire facias*, or the premises by ejectment.[1] But in Scott *v.* Fields,[2] where the plaintiff brought an action of debt upon a mortgage in common form, and was allowed to prove by parol evidence, that no such bond was actually given as the mortgage recited; it was held, that the action could not be maintained. In giving the opinion of the Court, reversing the judgment of the Court below, Sergeant, J., remarks: — "A mortgage, in its origin, was a conveyance of land, with a condition annexed, that, on payment of a sum of money by the grantor to the grantee, at a certain day, the conveyance should be void. In case of the non-payment, the remedy of the grantor (grantee) was by a proceeding *in rem*. It was never considered as binding on the mortgagor personally for the payment of the money. The authorities and the reason of the thing seem to show, that a mortgage is not, of itself, an instrument by which a personal liability for the money is raised, and on which an action of debt or covenant can be maintained; — yet, that if there be any prior or ac-

[1] Wharf *v.* Howell, 5 Binn. 499. See Stoever *v.* Stoever, 9 S. & R. 448; Hicks *v.* Hicks, 5 Gill & J. 85.

[2] 7 Watts, 360.

companying cause of action which, of itself, creates a personal liability distinct from the mortgage, such as a loan, a bond, a note, or other claim, the mortgage is not to be considered as merging such claim or demand, but is merely a collateral security. It is contended in the present case, that there is, in this mortgage, an acknowledgment of a debt, which is a sufficient ground to maintain the action. If there were such an acknowledgment of a prior debt and no more, as, for instance, if it recited money borrowed, it would rather seem, from the authorities, that the action *in personam* should be on the contract by which the debt arose, and that no implied contract inferred from the mortgage will be sufficient. But here the acknowledgment is of a bond, — and the mortgage is declared to be given to secure the payment of the bond. No contract can be implied from the mortgage, when the contract is express and formal. '*Expressum facit cessare tacitum.*'" It was further remarked, that even if the evidence showed that no bond was actually given, but the parties waived it; this action could be sustained only on the language of the mortgage.

11. In New York it has been held, that the mortgagee may maintain a personal action for the debt, upon the acknowledgment, in the deed, of indebtedness, and that the conveyance is made for security.[1] But not unless there is such an acknowledgment, or an agreement to pay.[2] Under the Revised Statutes of New York, no covenant to pay the sum secured by a mortgage can be implied from the mortgage itself; and where a debt is discharged by a mortgage or an absolute deed, as security for repayment of the consideration, the only remedy for payment is upon the premises conveyed.[3]

12. In New Hampshire, upon a construction of the statute relating to mortgages, it was held, that, to constitute a mortgage, the land must be put in pledge, on condition, for the payment of money or some other act. Otherwise, the conveyance will be construed as a conditional sale.[4]

[1] Elder *v.* Rouse, 15 Wend. 218.
[2] Weed *v.* Covill, 14 Barb. 242.
[3] Hone *v.* Fisher, 2 Barb. Ch. 559.
[4] Porter *v.* Nelson, 4 N. H. 130.

13. In Maine, personal security is not necessary to constitute a mortgage.[1]

14. In Massachusetts, the rule has been thus stated: — "Where there is a bond or covenant in the deed to repay the money lent, it is, at law, a debt; and the Court of Chancery considers it in good conscience due, although there is neither bond or covenant to enforce the repayment."[2] And, in another case, "the deed of mortgage creates a contract respecting a debt, as well as a conveyance of the estate."[3] So, a deed of land, and a bond made at the same time to reconvey, on payment of a sum of money, without any personal security therefor, constitute a mortgage; and the mortgagee's right under the same will pass by a devise of "all the obligations for money due to him." Parker, C. J., says: — "The grantee could no otherwise have acquired an indefeasible estate, than by entry to foreclose, or judgment as in cases of mortgage; and his estate was liable to be defeated at any time, by the payment of the debt and interest, after entry for condition broken," &c.[4] In Bodwell *v.* Webster,[5] Putnam, J., refers to the above decision, and suggests, as his own opinion, that the want of mutuality, in regard to the recovery of the debt, enters much into the equity of the case; upon the ground that, in case of depreciation of the property, the grantee must bear the loss, and therefore should have all the advantage of a failure to perform the condition.[6] And in a very late case it is said, the absence of a personal obligation accompanying the conveyance "is only one circumstance, to be regarded in ascertaining whether it is to be treated as a mortgage or a sale with a contract for repurchase."[7] (*a*)

[1] Smith *v.* People's, &c. 11 Shepl. 185; Mitchell *v.* Burnham, 44 Maine, 299.

[2] Reading of Judge Trowbridge, 8 Mass. 564.

[3] Penniman *v.* Hollis, 13 Mass. 430.

[4] Rice *v.* Rice, 4 Pick. 349, 352. See Rice *v.* Bird, 22 Ib. 350.

[5] 13 Pick. 415.

[6] See also Flint *v.* Sheldon, 13 Mass. 448.

[7] Per Bigelow, C. J., Murphy *v.* Calley, 1 Allen, 109.

(*a*) A mortgagee assigned her interest in the mortgaged premises, in consideration of a sum loaned to her, and promised, orally, to repay such sum

15. In Vermont, a quitclaim deed, with a consideration in money named, and a condition that the grantor may redeem on paying back such consideration, with interest, is not evidence of a debt, like a note and mortgage, but more in the nature of a right to repurchase.[1]

16. It has been held in North Carolina, that the mortgagor has a right to redeem, though the mortgage contains no covenant.[2]

17. It has been held in Texas, that if a conveyance, in whatever form, is alleged and proved to be a mortgage to secure a loan of money, and the property is lost without the mortgagee's fault; he may recover the money, though there be no express promise to repay it.[3]

18. In Alabama, where the maker of several notes, payable to his own order, makes a mortgage to a third person, to secure their payment, he thereby admits that they are valid securities for the payment of money in the hands of the mortgagee, although not regularly indorsed.[4]

19. In South Carolina, a recital, in a mortgage, of the bond secured by it, is not sufficient evidence of the debt, unless the loss or destruction of the bond is shown; especially where, as in South Carolina, the bond is negotiable.[5]

20. In Missouri, one owing a note for $300 conveyed land to the holder, at the price of $1,000. The note not being at hand at the time, he gave another note for $260, for money advanced, and the creditor gave, at the same time, a note for $440. Held, this was not sufficient to show that the deed was a mortgage.[6]

21. A mortgage is not a note, bond, bill, or other instrument in writing, within the act of Illinois, concerning prom-

[1] Henry *v.* Bell, 5 Verm. 393.
[2] Wilcox *v.* Morris, 1 Mur. 117.
[3] Stephens *v.* Sherrod, 6 Tex. 294.
[4] Hartwell *v.* Blocker, 6 Ala. 581.
[5] Chewning *v.* Proctor, 2 McC. Ch. 11.
[6] Edwards *v.* Ferguson, 14 Mis. 469.

---

with interest, unless the assignee should receive it from the estate. Held, the mortgagee was liable, as trustee of the assignee, to this amount. Hills *v.* Elliot, 12 Mass. 26.

issory notes, and want or failure of consideration is no plea to a *scire facias* for foreclosure.[1]

22. In Tennessee, a mortgage recited that the defendant was "indebted to the plaintiff in the sum of eighty-nine dollars and ninety-two cents, which should have been paid on the 1st of January, theretofore." Held, a covenant to pay money, upon which an action of debt would lie.[2] (*b*)

23. Prof. Greenleaf comes to the conclusion, that a deed, merely containing the proviso, that, if a certain sum be paid at a certain time, the deed shall be void, without any accompanying bond, note, or other personal security, is merely evi-

[1] Hall *v.* Byrne, 1 Scam. 140. [2] Couger *v.* Lancaster, 6 Yerg. 477.

(*b*) In this connection, may be stated the rule as to the personal liability of the respective parties, in case of *a conveyance of land mortgaged.*

In New York, it is held, that the purchaser of land, subject to mortgage, the mortgage debt forming part of the consideration, is bound to indemnify the grantor, though he enter into no bond or covenant to do so. Dorr *v.* Peters, 3 Edw. Ch. 132.

But also, that, where land is conveyed expressly subject to a mortgage thereon, and it is apparent that the consideration expressed in the deed was the estimated value of the premises over and above the incumbrances; those circumstances furnish no evidence of an agreement by the purchaser to become personally bound for the payment of the mortgage. Tillotson *v.* Boyd, 4 Sandf. 516. And the omission to insert in a deed a covenant, that the grantee will assume or pay a mortgage, is strong evidence that the parties did not intend he should be liable. Ibid.

A mortgagor conveys to A., who conveys to B., and B. to the defendants. There was no agreement that B. should be liable for the debt; but the deed to the defendants described the land, as "subject to the mortgage, which is taken as part of the consideration-money, and which the purchaser agrees to pay and discharge." The mortgagee brings a bill to foreclose, and seeks to hold the defendants liable for the deficiency. Held, they were not liable. King *v.* Whitely, 1 Hoffm. Ch. 477.

In Virginia, where a purchaser gives a mortgage for the purchase-money, and conveys the land, the land will still be liable for the amount of the mortgage; and, if insufficient, the mortgagor will be personally liable; but his vendee will not be personally liable therefor, without a special agreement to that effect. Bumgardner *v.* Allen, 6 Munf. 439.

dence of a lien on the land, or of a conditional sale, unless it contains an admission of a debt due, either direct or indirect; and if the debt is either thus admitted or can be proved *aliunde*, it is recoverable, as if there were no mortgage; unless the evidence shows an agreement to rely solely upon the property. And this agreement would reasonably be inferred from the absence of a personal obligation, contrary to general usage.[1] (*c*)

24. Whether a mortgage *to secure the obligation of a third person* binds the mortgagor personally, is a question of intention, depending on a just and reasonable construction of the whole instrument. Such intention is not proved by a clause, in which the mortgagor "confesses judgment for the amount of the debt, and agrees, in case of its non-payment, as provided by the act, that the law in such cases made and provided may be strictly enforced and summarily put in execution." This clause merely gives a remedy by executory process against the property; but does not authorize a *fi. fa.* against other property, nor the registry of the act, so as to operate as a judicial mortgage.[2]

26. In this connection may be considered a certain class of mortgages, of not unfrequent occurrence, the condition of which is not for the payment of money, but the performance of *some collateral act.* The most common conveyances of this description, are mortgages made to secure future *support and maintenance* to the mortgagees or other parties; and various questions have been raised, as to the validity, construction, and method of enforcement of such mortgages.[3]

27. Prof. Greenleaf remarks, that in those States, where

[1] 2 Greenl. Cruise, 83 *n.*

[2] New Orleans, &c. *v.* Hogan, 1 La. Ann. R. 62.

[3] See ch. 8, § 40 *et seq.*

(*c*) This is expressly provided by statute in New York, Wisconsin, and Indiana. 2 N. Y. Rev. Sts. 22; Wis. Ib. ch. 59, § 6; Ind. Rev. Sts. ch. 29, § 31.

the Courts have not full equity jurisdiction, it has been questioned whether any deed can be regarded strictly as a mortgage, unless the condition is for the payment of money, or the performance of a contract where the damages are capable of computation by the Court; and whether, therefore, conditions for general support, comfort, and maintenance, good behavior, &c., are susceptible of relief, unless under a general equitable jurisdiction. He adds, however, that in the case of *maintenance*, the damage, of course, may be computed by the value of board per week;[1] and the weight of authority is clearly in favor of the validity of this class of mortgages. (*d*)

[1] 2 Greenl. Cruise, 80 *n*. See Noyes *v*. Sturdivant, 6 Shepl. 104; Page *v*. Green, 6 Conn. 338.

(*d*) In a suit in equity to foreclose a mortgage, where the obligation, to secure which the mortgage was given, is unliquidated, and there is nothing before the Court to show that the amount due is less than the amount necessary to give the Court jurisdiction, the Court is not divested of its jurisdiction, although the master should report a less sum to be due. Ferguson *v*. Kimball, 3 Barb. Ch. 616. In Louisiana, the exact sum must be expressed in the act of mortgage. La. Civ. Code, art. 3277. In Massachusetts, Maine, and New Hampshire, the statute law would seem to have settled that conditions for support, &c., are sufficient to constitute a mortgage. Mass. Rev. Sts. ch. 107, §§ 6, 23; Me. Rev. Sts. 1840, ch. 125, § 15; N. H. Rev. Sts. ch. 131, § 1. But a very late case in New Hampshire decides otherwise. Bethlehem *v*. Annis, 40 N. H. 34. See ch. 5, s. 1, *n*. Where the condition of a mortgage is to perform *personal services*, and there is a breach, it seems, a conditional judgment may be rendered for the damages. Hoyt *v*. Bradley, 27 Me. 242. The following are some of the leading cases of mortgages *for support*. In a suit for foreclosure of a mortgage, conditioned for the support of the mortgagee's widow, who has deceased; the question is not how much she received, but how much she was entitled to receive; and the mortgagor cannot exempt himself from liability by proof that she received but a partial support from any person. Ferguson *v*. Kimball, 3 Barb. Ch. 616. Mortgage from a son to his mother, who had the privilege of residing in his house under the will of her husband, conditioned to "find her firewood for one fire, to be drawn and cut at the door, fit for use." The house being burnt, the mother took up her abode with another son, and demanded fire-

28. The question has been raised, whether the provision in the mortgage, relating to payment of a debt, even though

---

wood of the mortgagor, to which he replied that he was not bound to furnish it off the farm. She then demanded that he should furnish it at the old place, to which he replied that he would see about it, but no wood was furnished by him. Held, a sufficient demand and refusal to sustain an action on the mortgage. Fiske *v.* Fiske, 20 Pick. 499. So although she was at times living at some distance, she having pointed out a place of delivery within a reasonable and convenient distance. Ibid. A mortgage was conditioned, that the mortgagor should keep a cow for the mortgagee. In consequence of improper keeping the latter was obliged to sell the cow at a low price. In a suit upon the mortgage, held, the plaintiff was entitled to judgment for the cost of keeping a cow after the sale, without having purchased one and tendered it to the mortgagor to be kept; the latter never having offered to keep another cow, nor given any assurance that one should be better kept. Ibid. A mortgage was given, conditioned to support the mortgagee, his wife, and a *non compos* daughter, during their lives and the life of the survivor. The father and mother having died, the daughter left the place where support had been furnished, and went to a distant town, where she became chargeable as a pauper. The selectmen notified those of the town which she left, and where she had her settlement, who brought her back, and requested the mortgagor to support her and pay the expenses incurred, but he refused. Held, no breach of condition, there being no evidence that he was in fault, and the town being strangers to the contract for support. Rhoades *v.* Parker, 10 N. H. 83. But the selectmen having obtained the authority of her guardian for that purpose, and then applied to the mortgagor to support her, to which he replied that he thought it best to have a trial about it; that his counsel had told him, he had better let the town support her, and bring an action against him, and he would then have a better chance in a controversy with those with whom he had contracted for her support: held, this was evidence of a refusal to support, and a breach of the condition; and that it was not necessary, after a refusal, to carry her to his house, or to the place provided by him, and make a demand of the support there. Ibid. Mortgage by a son to his father, with condition to "provide a comfortable room or apartment for his father and mother, together with suitable meat, drink, lodging, and apparel, with all things necessary for their support and comfort, both in sickness and in health, suited to their age and condition, and with a good horse and what shall be necessary for their comfort and convenience, both to meeting and to visiting their friends, during their natural lives." At the time the mortgage was made, the father and mother, with all their children, lived on the farm. The mortgagee died, then the

expressed in the form of *a condition*, might not be rightly described in another instrument, as *a covenant*. It is said, a

---

mortgagor, and the right of redemption was sold to the plaintiff; and subsequently, the defendant, as administrator of the mortgagee, took possession for breach of the condition as to the support of the mother. Upon a bill in equity to compel the defendant to acknowledge satisfaction of the mortgage; held, the mother was entitled to her entire support, independent of any labor to be performed by her; that she was not bound to reside on the farm, to entitle her to such support; that she could not include in the mortgage the expense of a journey to visit a son, living forty miles from the farm; and that having been supported, for some time after the mortgagor's death, by his son, without any request from his administrators, and after they had offered to support her, the cost of her support during that time could not be charged upon the mortgage. Thayer *v.* Richards, 19 Pick. 398. As suggested in the text, a mortgage, conditioned for support of the mortgagee, admits of *compensation*; and a purchaser from the mortgagor will be allowed to redeem, by making compensation for past support, in an amount to be determined by a master, and paying a specific sum for the future. Austin *v.* Austin, 9 Verm. 420. A receipt in full of all demands is no discharge of a mortgage, conditioned for the future support of the party who gives the receipt. The word *demands* must be understood to refer to subsisting debts, at least to such as are absolutely due and susceptible of liquidation. It cannot embrace a right to future support, which is in its nature contingent, depending upon the party's life for its continuance, and upon various uncertain circumstances for its amount. Ibid. An indenture, accompanying a conveyance of land, whereby it is let to the grantor, for life, "for the purpose that Samuel should maintain Leonard for life," and "of securing to Leonard the maintenance aforesaid," constitutes the transaction a mortgage. Lanfair *v.* Lanfair, 18 Pick. 299. The Court remark (Ibid. 303, 304): — "The indenture is to be construed with reference to the whole instrument as connected with the deed of Leonard to Samuel, and as a part of the transaction. An enlarged and liberal, rather than a microscopic view is to be taken, in order to ascertain and carry into effect the intent of the parties. It expresses upon its face, that it is given by Samuel to Leonard for the purpose of securing to Leonard the maintenance which Samuel was to provide for Leonard and his wife. It is a security. And this is a *sine qua non* of a mortgage. If the instrument be made as a security for the payment of a debt or the performance of a duty, it is a mortgage, and the substance and not the mere form of the instrument is to be regarded. The effect of the instrument will ascertain its legal character." Where a mortgage is conditioned to support the mortgagee and his wife during their lives; his administrator may fore-

bond, conditioned for the performance of all covenants, payments, articles, and agreements, comprised in a mortgage, is forfeited by non-payment of the mortgage-money at the time stipulated in the mortgage.[1] Where such a bond was given, and the mortgage contained covenants against incumbrances and for further assurance, the ground was taken, in defence against an action upon the bond, that, as the mortgage contained no covenant for payment, the proviso was merely in advantage of the feoffor, that if he paid the money he should have back the land; and it was in his election to pay the money or lose the land; therefore the condition of the bond did not extend to such payment, but was confined to the other covenants in the deed, namely, to save harmless from incumbrances, &c. No judgment, however, was finally rendered.[2] But in another case, where an obligation was given to perform all the covenants and conditions in an indenture of mortgage; which mortgage contained a proviso, that, if the mortgagor paid the money at the day, the mortgage should be void; in an action upon the bond, after much deliberation, the Court decided for the plaintiff.[3]

29. Although a mortgage in this country does not ordinarily contain a covenant for payment of the mortgage debt; it is usually in the form of a warranty deed, with the *covenants of title* incident to that form of conveyance. Some questions have arisen with regard to the legal effect of these covenants, more particularly when considered in connection with the reciprocal covenants in an accompanying absolute deed from the mortgagee to the mortgagor. (*e*)

[1] Pow. 12 *a*.
[2] Briscoe *v.* King, Cro. Jac. 281; Bristoe *v.* Knipe, Yelv. 206, 2 Lev. 116.
[3] Tooms *v.* Chandler, 2 Lev. 116; 3 Keb. 387.

---

close for breach occurring both before and since his death. The widow need not appear in the action. Marsh *v.* Austin, 1 Allen, 235. See, further, Gilson *v.* Gilson, 2 Allen, 115; Pettee *v.* Case, Ib. 546; also, ch. 8.

(*e*) See Swatman *v.* Ambler, 8 Exch. 72. Upon the covenant against

Thus to an action on the covenant of seisin, in a deed of warranty from the defendant to the plaintiff, the defence was

---

incumbrances in a mortgage, it is held, that only nominal damages can be recovered. Randell *v.* Mallett, 2 Shepl. 51. Also, that where the grantee in a warranty deed gives back a bond to reconvey on demand, and in the mean time allows the grantor to occupy; no action can be maintained upon the covenants in the deed. Hatch *v.* Kimball, 2 Shepl. 9. But where, in a mortgage with full covenants of warranty, after breach of condition, by consent of parties, the equity of redemption was extinguished by a decree of foreclosure without sale, and afterwards the mortgagee was evicted by proceedings under a prior mortgage unknown to either party; it was held, that the decree of foreclosure did not merge the mortgage in a fee, or in any way bar proceedings on the mortgage under the covenants of warranty; that the mortgagee was not bound to discharge the first mortgage, but could depend upon the covenants. Lloyd *v.* Quimby, 5 Ohio, (N. S.) 262. The following miscellaneous decisions relate to the operation of covenants made in reference to or connection with a mortgage, though not inserted in the mortgage itself. (See ch. 19.) It has been held, that where land is sold, with a covenant against incumbrances, and no eviction has taken place, or payment been made of the mortgage debt, the mortgage cannot be set up in defence to a suit for the price. Pomeroy *v.* Burnett, 8 Blackf. 142. But if the mortgage exceed the debt, a court of equity will enjoin the suit, until the incumbrance be reduced to the amount of the debt. Buell *v.* Tate, 7 Blackf. 55. Where one takes a deed without covenants, knowing of incumbrances upon the land, and gives back a mortgage for the price, but it does not appear that he agreed to assume the incumbrances; he may pay them, and deduct the amount from the mortgage. Wolbert *v.* Lucas, 10 Barr, 73. Where a mortgagee, under a prior mortgage, threatened to enter and expel the covenantee, who yielded to the claim, against which he could not defend, it is a breach of the covenant of warranty; upon the ground, that an actual ouster or expulsion by force of a paramount title is equivalent to an eviction by legal process. Sprague *v.* Baker, 17 Mass. 586. Where a mortgage is made to indemnify the mortgagee against an incumbrance on other land in favor of a third person, which land the mortgagee conveys with covenants against incumbrance, and agrees to redeem the one to such third person; it seems, the grantee may claim indemnity from the mortgaged premises, if evicted, or obliged to pay such incumbrance. Upham *v.* Brooks, 2 W. & M. 407. This right is strengthened by his being assignee and grantee of the mortgagor; and he is entitled to recover the premises from an assignee of the mortgagee, on paying any debt from the mortgagee to the assignee, secured in the mortgage. Ibid. But the assignee cannot hold

set up, that, at the time of the defendant's making such deed, the plaintiff gave back to the defendant a mortgage of the

---

the premises against third persons entitled to redeem, for any sum due him from the mortgagee, but not included in the mortgage. Ibid. If the mortgagee has become insolvent, and his covenant thereby worthless, yet the grantee should obtain releases to the mortgagee on his covenants to the grantee, or file a good bond of indemnity against them. The assignee of the mortgage is a trustee of the land, to indemnify against the incumbrance referred to in the mortgage. Ibid. The assignee, being in possession, was held bound to pay rents when they ought to have been received, whether actually collected or not. Ibid. Conveyance by a mortgagor in possession, with a bond of indemnity to the purchaser, against the mortgage. Judgment being afterwards recovered upon the mortgage against the terre-tenant, without actual notice to the mortgagor, and the land sold on execution; held, in a suit upon the bond, if the defendant had notice of the prior suit, he was bound by the judgment, and must repay the purchase-money to the plaintiff. If he had not notice, he might make the same defence which he could have made to the action on the mortgage. Culp *v.* Fisher, 1 Watts, 494. Where land, subject to mortgage, is conveyed with warranty, the covenant runs with the land, and is bound by the lien of a judgment against the grantee or his assigns; and if the grantor subsequently acquires a title to the land, under a foreclosure of the mortgage, such title accrues to the benefit of a purchaser at the sheriff's sale under the judgment, and the former is estopped from questioning the title of the latter. Kellogg *v.* Wood, 4 Paige, 578. The grantor is also bound to indemnify the purchaser at the sheriff's sale against the mortgage, if it remains unpaid, or if the lien is continued by the substitution of a new mortgage for the purchase-money. Ibid. If one owning land, subject to mortgage conveys it with warranty, and the purchaser conveys to a third person with warranty, both covenants run with the land; and if the second purchaser afterwards conveys to the original grantor, the covenants in the deed from the first purchaser are merged at law, so far as respects the lien of the mortgage. But if in the mean time the first purchaser has agreed with his grantor to pay off the mortgage, the covenants are not merged in equity, but will pass to a subsequent purchaser, and give him an equitable claim against the first purchaser, for an indemnity against the mortgage. Ibid. See Law Register, Feb. 1863. Where a mortgage was given to secure the price of land sold, the mortgagee representing that he was the owner; in a suit for foreclosure, the mortgagor set up as a defence, that this representation was untrue, and that he had since purchased the estate from a third person. Held, insufficient, for want of the additional fact, that the misrepresentation was the inducement to the

same land, to secure the entire consideration, of which no part had been paid; and that the mortgage contained the same covenants as the absolute deed. It was held, that the covenants of the mortgage did not operate as a *rebutter* to the claim of the plaintiff, and that the action was maintainable. The Court remark: — "It is then said, that (the defendant's demand) should operate as a rebutter to the demand of the plaintiff, to avoid circuity of action. The principle of rebutter is one well known in law, and is to be applied in all proper cases. The present does not seem to us to be one. It might do injustice to the plaintiff. The defendant holds the plaintiff's notes of hand secured by her mortgage. Various cases might be readily supposed, where such a defence ought not to prevail; as in cases of large payments advanced towards the purchase-money, and a mortgage to secure only a small residue, and that, by the terms of the contract, to be paid at some remote future day. There is no necessity for permitting this defence, with a view of protecting the rights of the defendant in reference to his counter demands. The entry of judgment may be postponed, if the case requires it, to await a set-off, after the defendant

---

mortgagor's purchase of the land. M'Fadden *v.* Fortier, 20 Ill. 509. Eviction from part of the land is a defence to a suit for foreclosure; and proceedings will be stayed till the question of damages is settled either by a suit at law, or by directing an issue or reference to a master. The last course will generally be taken, unless the complainant requests an issue. Coster *v.* Monroe, &c. 1 Green, Ch. 467. An outstanding title or incumbrance, there having been no eviction, as a right of dower in the grantor's widow, is no reason for refusing foreclosure of a mortgage for the price, though the conveyance was with warranty. Glenn *v.* Whipple, 1 Beasl. (N. J.) 50. Where it is sought to enjoin a foreclosure, without proceeding by civil action in the district court, on the ground that the mortgage was executed to secure the purchase-money; that the covenants of the deed were broken; and that the vendor had no title to the land; the bill should allege either fraud or mistake, or show that the complainant would sustain irreparable injury, by being turned over to his legal remedy upon the covenants. Crocker *v.* Robertson, 8 Clarke, (Iowa,) 404.

shall have perfected a judgment on his claims. This seems to us a more proper mode than to allow the claims of the defendant, as covenantee under the mortgage deed, to defeat the present action."[1] So the grantee in the absolute deed may in such case maintain an action upon the covenant against incumbrances. The mortgage is no estoppel, because the mortgagor may have removed the adverse title before making the mortgage. For the same reason, his action is not barred upon the ground of preventing a circuity of action. In these points of view, the two deeds are regarded not as *concurrent* but *successive*. The mortgage is no bar to the action for the additional reason, that such covenant is not assignable, and therefore did not pass back to the mortgagee.[2] So, where the grantee in a warranty deed, with a mortgage back, with covenants, brings an action against one who used a highway which passed over the land, upon the grantor's representation that it was not a legal road, but fails in the suit; the mortgage does not constitute a rebutter, but the grantee may bring an action upon the covenant, and recover the costs of the other suit.[3] And, on the other hand, where land is conveyed with covenants of general warranty, and at the same time mortgaged back with like covenants; the assignee of the mortgagee cannot maintain an action upon the covenants in the mortgage, and recover for an eviction under a judgment for dower against him in favor of the widow of the mortgagee.[4]

30. The doctrine, that a grantee from one who had no title at the time of the conveyance, but has subsequently acquired one, takes it by *estoppel*, in virtue of the covenants in the deed, has been applied to a mortgage. Thus, where land was conveyed, and at the same time mortgaged back, (both conveyances being with covenants of warranty,) and the mortgage was assigned, and, after the assignment, the

[1] Sumner *v.* Barnard, 12 Met. 459, 461, 462; acc. Brown *v.* Staples, 28 Maine, 497. See Andrews *v.* Wolcott, 16 Barb. 21.

[2] Hubbard *v.* Norton, 10 Conn. 422. See Great Falls, &c. *v.* Worster, 15 N. H. 412.

[3] Haynes *v.* Stevens, 11 N. H. 28.

[4] Smith *v.* Cannell, 32 Maine, 123.

mortgagor acquired a title to the same premises under a sale for taxes assessed before the conveyances; held, the mortgagor could not set up such title adversely to his own conveyances, but it enured instantly to the benefit of the assignee of the mortgage, and the remedy of the mortgagor was on his grantor.[1] (*f*) So two successive mortgages, with covenants of warranty, were made of the same land. The second mortgagee bought the first mortgage, receiving from the first mortgagee a quitclaim deed. On the same day, the second mortgagee gave a mortgage with covenants to a creditor. There was no proof which of the two last named deeds was first delivered; but the grantee of one was a subscribing witness to the other, and both were attested by, and acknowledged before, the same magistrate. The right of redemption of the original mortgagor having expired, the last mortgagee brings ejectment against him for the land. Held, the deed to the plaintiff should be presumed to have been made after the deed to his grantor; or, if not, the covenants in the deed first executed had the effect to vest a title in the plaintiff, when the conveyance was made to him, *by estoppel;* and this title was effectual against the defendant.[2]

[1] Gardner *v.* Gerrish, 33 Maine, 46. [2] Dudley *v.* Cadwell, 19 Conn. 218. See Leavitt *v.* Pell, 27 Barb. 322.

(*f*) But if one afterwards merely contracts to buy a part of the premises of one of the mortgagors, it does not prevent him from acquiring a title under the tax sale, and holding it for his own benefit. 33 Maine, 46.

CHAPTER VII.

POWER OF SALE.

1. Notwithstanding the inflexible rule considered at length in a former chapter,[1] against impairing or abridging the equity of redemption by any special agreement of parties, the principle seems to be now well established, though after great doubt and discussion, that a clause may legally be inserted in the mortgage deed, empowering the mortgagee, upon breach of condition, to make sale of the mortgaged premises, pay his debt from the proceeds, and account with the mortgagor for the balance. And such sale, made after the *law-day*, and in pursuance of the terms of the mortgage, vests in the purchaser all the title conveyed by the mortgage, free from the right of redemption.[2] The sale may be for non-payment of interest.[3]

2. This privilege of the mortgagee, arising from an express provision of the deed, would seem at first sight a departure from the general principle above referred to, inasmuch as it allows a particular contract to control or override the broad, equitable rule of protecting the mortgagor's rights against any hard terms which his peculiar necessities might impose upon him. A moment's reflection, however, shows a radical difference between the cases to which this rule has been applied, and the one, now under consideration, of a power to sell. In the former, by a breach of condition, the estate is absolutely forfeited, and, with its whole value or proceeds, forever lost to the mortgagor. In the latter, it is sold, and, as will be seen, must be fairly and judiciously disposed of; and the mortgagor receives the avails, after his debt is fully

[1] See ch. 4.
[2] Cheek *v.* Waldrum, 25 Ala. 152
[3] Richards *v.* Holmes, 18 How. 143.

liquidated. The power of sale is said to apply solely to *the remedy*, and not to impair any *right* of the mortgagor.[1] (*a*)

3. On the other hand, the power of sale does not bar *the mortgagee's* right to foreclose by judicial proceedings.[2] It is held that a sale may be made, pending a bill to foreclose.[3] The remedy is *cumulative* merely, and in no respects affects the jurisdiction or proceedings of a Court of Chancery.[4] Nor, in general, does its validity depend on proceedings at law or a decree in equity.[5] It is treated as a *power of attorney*.[6]

4. Contrary to the general rule, however, it is sometimes held, that the power can be executed only through a Court

[1] Wilson *v.* Troup, 2 Cow. 195. See Dobson *v.* Racey, 3 Sandf. Ch. 60; Bennett *v.* Union, &c. 5 Humph. 612; Young *v.* Roberts, 21 Eng. Law & Eq. 571; Fanning *v.* Kerr, 7 Clarke, (Iowa,) 450.

[2] Marriott *v.* Givens, 8 Ala. 694; Carradine *v.* O'Connor, 21 Ib. 573; Morrison *v.* Bean, 15 Tex. 257.

[3] Brisbane *v.* Stoughton, 17 Ohio, 482.

[4] Walton *v.* Cody, 1 Wis. 420.

[5] Wilson *v.* Watts, 9 Md. 356; Crocker *v.* Robertson, 8 Clarke, (Iowa,) 404; Leffler *v.* Armstrong, 4 Iowa, 482; Bloom *v.* Van Rensselaer, 15 Ill. 503.

[6] Smith *v.* Bovin, 4 Allen, 518; Mass. Gen. Sts. 716. Whether, in this aspect, a *married woman* can thus bind herself, see Roarty *v.* Mitchell, 7 Gray, 243.

(*a*) The civil law implies a power of sale in the mortgagee, and even an express agreement will not deprive him of it. 1 Dom. 360. In Virginia, it is said to be invalid. 4 Kent, 148, n. It has been held in Virginia, (Taylor *v.* Chowning, 3 Leigh, 654,) that a sale under a power is voidable by the mortgagor, the character of creditor and trustee being inconsistent; but if the sale is a fair one, and acquiesced in by the mortgagor, it will bind him. In Ohio, a power of sale may be given to a third person for the mortgagee's benefit. Brisbane *v.* Stoughton, 17 Ohio, 482.

The power of sale has sometimes been claimed, in virtue of a special agreement, for the *mortgagor*. But a proviso, that, if the mortgagor raise, or be able to raise, money to pay the debt, by selling or re-mortgaging, the mortgagee shall reconvey to him, that he may do it; does not give the mortgagor a power of sale, which he would have without it, but is merely a covenant to reconvey to him for the purpose expressed. Coffing *v.* Taylor, 16 Ill. 457.

Mortgage to secure notes payable in three years. The parties afterwards agreed in writing, that the mortgagor might cut and haul off timber, and might sell the property to pay the debt, within four years from the date of the notes. Held, a suit for foreclosure did not lie till the end of the four years. Rogers *v.* Mitchell, 41 N. H. 154.

of Equity.[1] In Pennsylvania the distinction is made, that equity can interfere only where the power is to be executed through a trustee.[2] So, upon a bill filed by the infant heir of a mortgagor, a sale under a power was restrained, and the sale conducted by the master, after an inquiry as to the amount of the debt.[3] So, where one surrendered an equity of redemption, being ignorant that the mortgage, to which the vendor represented the land as subject, contained a power of sale after a year's default, the mortgage not being on record; and filed his bill for an injunction against the mortgagees, alleging a sale by such ignorance, and that the mortgage was fraudulent; but the fraud and all intent to mislead were denied in the answer: a temporary injunction was granted, to allow him time to raise money and redeem.[4] And where a mortgage gives a power of sale to the mortgagee in a certain time after the debt becomes due; it is held that no action can be maintained upon the mortgage within that time.[5] So, if the terms of the power itself require some act of foreclosure, as preliminary to the sale; the sale will be invalid, unless such act be performed. Thus, where the mortgage provides that the mortgagee, upon breach of condition, may enter and take possession immediately, and sell the land; a sale cannot be made without a previous entry and taking possession, or at least a demand for possession and refusal.[6]

5. In consequence of the delays incident to the usual equity of redemption, a power of sale has now become a very frequent provision in deeds of mortgage. It will be profitable, therefore, as indicating the most desirable form in which this power may be expressed, and the proper safeguards of the mortgagor's rights, with which its exercise should be surrounded, to take a general view of the judicial discussions, through which the principle in question has

[1] Ford *v.* Russell, 1 Freem. Ch. 42.
[2] Bradley *v.* Chester, &c. 36 Penn. 141.
[3] Van Bergen *v.* Demarest, 4 Johns. Ch. 37.
[4] Platt *v.* M'Clure, 3 W. & M. 151.
[5] Second, &c. *v.* Platt, 5 Duer, 675.
[6] Roarty *v.* Mitchell, 7 Gray, 243.

been arrived at. Perhaps there is no one in the whole law of mortgages, at last firmly established, which in its progress has been more seriously questioned or more earnestly resisted, as a manifest infringement upon the privilege, so carefully guarded, of redeeming estates, which have been conveyed only by way of security for debt. The final result of the decisions is said to be, that a power of sale may be exercised by the mortgagee, where it is *free from doubt*.[1] (*b*) It will be jealously watched, and declared void for the slightest unfairness or excess, or for anything which prevents competition;[2] and the sale will be strictly construed as against the mortgagee. Thus where it is not made for money, but for an article of fluctuating value, the vendor is chargeable with its highest market value.[3] And an injunction may be granted against a sale under the power, upon a bill which alleges a tender of the debt. Nor is it a valid objection, that in such bill the land is imperfectly described.[4] (*c*)

6. Mr. Coventry says:[5] — "Mortgages of this description are comparatively of modern date. Their validity was at first much questioned, and when the doubts surrounding their introduction were removed, they were for a considerable time, and are even now in some degree, viewed as a harsh measure, and only to be used where the money lent

[1] Curling *v.* Shuttleworth, 6 Bing. 121. See Green *v.* Tanner, 8 Met. 423; Wilson *v.* Troup, 2 Cow. 195; Clay *v.* Willis, 1 B. & C. 364; Gorson *v.* Blakey, 6 Miss. 273; Destrehan *v.* Scudder, 11 Miss. 484; Mitchell *v.* Bogan, 11 Rich. 686; Childs *v.* Childs, 10 Ohio St. 342; 36 Penn. 141.

[2] Longwith *v.* Butler, 3 Gilm. (Ill.) 32.

[3] Benham *v.* Rowe, 2 Cal. 387.

[4] Conant *v.* Warren, 6 Gray, 562.

[5] 1 Pow. 9 *a*, n. 1.

(*b*) Mr. Coventry remarks (1 Pow. 14, n.) that the case of Stabback *v.* Leat, a leading decision upon this subject, (Coop. 46,) when attentively considered, does not militate with the doctrine laid down by him as to the validity of a power of sale; and that the report of the case is taken from a hasty note on a brief, and has very little to recommend it either in terms or in substance.

(*c*) It is held in Indiana, that, under Rev. Stats. 1843, § 58, a second mortgagee is not affected by a sale under a power in the first, but may redeem it. Howe *v.* Woodruff, 12 Ind. 214.

approaches very nearly the value of the estate mortgaged, or where the interest is likely to run in arrear. A mortgage of this description is certainly a prompt, powerful security, compared with the common mode of mortgaging. It is, however, not inequitable in its results. It presses hard upon the mortgagor in point of time, but it takes no unfair advantage of him in the end; for, after payment of the money lent, the surplus is handed over to the borrower, and not kept by the mortgagee, as is the case on a foreclosure. The evil of the former mode of mortgaging is, that the mortgagee, in proceeding for the recovery of his money, is liable to be delayed for an indefinite time in chancery. The new mode is framed with a view to a settlement out of court."

7. Upon the same subject he further remarks:[1] — "At present, the principles of a sale and mortgage are entirely distinct. In a mortgage, the lender has nothing to do with the land; he looks merely to the security and repayment of his money. In a sale, the purchaser gives up his money forever, and looks solely to the land. It must be evident, that the principles applicable to the one transaction essentially differ from those governing the other. The mode, it is apprehended, which best accomplishes the object intended, is one where a mortgage with all its incidents is preserved, and the mortgagee himself is empowered to sell, if his money be not paid, at the expiration of six months' notice. It will be observed, that in making the mortgagee entire master of the estate, he is not only invested with the control of his own property, but is also a *trustee* of the equity of redemption, with absolute power to dispose thereof, not exactly for the best advantage of his *cestui que trust*, but for his own benefit, so far at least as his trusteeship stands in the way of a peremptory or immediate realization of his money. This is a character incompatible with a trustee; he is not free to act for the exclusive benefit of his *cestui que trust;* he is first to serve his own purpose regardless of those for whom he stands trusted, and then, having secured

[1] 1 Pow. 9 *a*, n. 1. See General *v.* Hardy, 4 Eng. Law & Eq. 44.

himself, he becomes a stakeholder as to the residue for the mortgagor. This inconsistent character is the most objectionable feature of the form before referred to, and it appears to have received the censure of the present Lord Chancellor; yet it is the editor's favorite form, as he had occasion to feel the inconvenience of the mode recommended by his Lordship. In a late case not yet reported, Lord Eldon is understood to have said, 'Here the mortgagee is himself made the trustee. It would have been more prudent for him not to have taken upon *himself* that character. But it is too much to say, that if the one party has so much confidence in the other as to accede to such an arrangement, this Court is for that reason to impeach the transaction. It is next provided,' continued his Lordship, 'that if the mortgagor shall make default in paying the sums stated at the appointed time, the mortgagee may make sale, and absolutely dispose of the premises conveyed to him. . It must be recollected, that this is a clause to be acted upon, not by a middle person, but the mortgagee is himself made trustee to do all those acts. The deed seems to me of a very extraordinary kind, and there are clauses in it upon which it would be very difficult to induce a court of equity to act.' Roberts *v.* Bozon, Chan. Feb. 1825, Ms."

8. Mr. Coventry proceeds to remark, that, "the above observations of his Lordship were thrown out in the exuberance of his dubitations, and were perfectly gratuitous, and obviously of a first impression;" and to express his own decided preference, in point of convenience and simplicity, of the practice which Lord Eldon considered of doubtful propriety, over the other method, of resorting to the aid of trustees. "In some deeds, assuming the character of a mortgage, with trusts for sale, it will be found that the proviso for redemption, and every feature of the ordinary mortgage, is omitted. This converts the deed into a conveyance for the payment of debts; and it seems clear, that, to such a species of mortgage, if it can be so called, the peculiar doctrines of tacking, priority, foreclosure, &c., are irrelevant.

Indeed, such an instrument may be more appropriately denominated a composition-deed than a mortgage; and it is apprehended, that the learning relating to that description of deed will be found applicable to a conveyance by way of mortgage, without a proviso for redemption." Mr. Coventry cites, as sustaining these views, the case of Martha Pettit, (Vice-Chan. 12th Aug. 1825,) in which there was a conveyance to and to the use of the petitioner, her heirs, &c., in trust, that she and they should, immediately, or when they should think fit, with or without the consent of the grantor, sell the estate, and stand possessed of the proceeds in trust, first, to retain and discharge the sum of £1,200 and interest, being a sum borrowed previously upon a deposit of title-deeds, and a covenant to execute a future mortgage, the future interest and the expenses of the trust, and pay over the surplus to the grantor. Between the loaning of the money and the execution of this deed, the petitioner lent to the grantor £1,350, with a warrant of attorney to confess judgment. The petition was to *tack* the judgment debt to the mortgage, the grantor having become bankrupt. The Vice-Chancellor held, that the conveyance was not a mortgage, but a conveyance in trust to sell for payment of debts, and ordered that the petitioner should reconvey, upon receiving £1,200 and interest. Upon the same subject, Mr. Powell remarks:[1] — "I am not aware that any case has occurred, where the transaction appears to have been, *in its original nature*, a mortgage or pledge by way of security for money, in which the validity of a sale under a trust of this nature, vested in trustees, without the concurrence of the mortgagor or his representatives, or a decree for foreclosure, or for sale for payment of the money lent, has come under the consideration of a court of equity; but unless such trust for sale be considered as clearly distinguishable *in principle* from a power to sell, in default of payment at a limited period, lodged in the mortgagee himself, the opinion of the Court in the case of Croft *v.* Powel,[2] seems to me to raise at least

[1] 1 Pow. 10. [2] Com. R. 603.

considerable grounds for doubting, whether the trustees alone, in such a case, can make an absolute, irredeemable title, without the direction of a court of equity."

9. The case referred to was substantially as follows: A. conveyed an estate to B., taking back a defeasance, which provided, that, upon payment of a certain sum within one year, B. should reconvey; but, if he failed to pay it within the year, B. should mortgage or absolutely sell the lands free from redemption, and from the proceeds pay the debt, and account for the balance to A. Some years afterwards, B. conveyed to C., the defeasance being mentioned and excepted in the deed, and A. knowing and assenting to the previous agreement for sale. A. brings a bill to redeem from C. Held, as between A. and B., the conveyance was a mortgage, and, in B.'s hands, redeemable at any time; and that, whether B. *might have* conveyed an irredeemable estate to C. or not, the express exception of the defeasance in the deed to C. showed an intention to leave it still in force. The case was distinguished from that of a trustee, authorized to sell for payment of debts, &c., there being, in such case, no original mortgage and no one to redeem. The Court further remarked, that C. would have required A. to join in the deed, had he expected an absolute title; and that, as he bought with notice of the trust with which B. was chargeable, it was also binding on him.

10. Upon this case Mr. Powell remarks,[1] that it throws a doubt over the efficacy of a power to sell, in passing an irredeemable title, no less where the power or trust is vested in the mortgagee himself, than where it is vested in trustees; because the difference between these cases is not in principle and substance, but merely in form, which courts of equity will not regard. On the other hand, Mr. Coote says,[2] the case of Croft *v.* Powel was considered as raising considerable grounds for doubt as to the validity of powers to sell; but, so far from it, it will, on consideration, be seen to be rather an authority in favor of these powers.

[1] 1 Pow. 11. [2] Coote, 171.

11. Cases in England, later than those referred to by these writers, seem, at least impliedly, to settle the legal validity of a power of sale. Thus the plaintiff, being indebted to the defendant, gave him an absolute deed of his farm, taking back a defeasance. He afterwards received further advances, till he owed about $600. The parties then agreed, that the defendant should have the farm for $800, and the defendant gave the plaintiff a note for the excess of that sum over the mortgage debt, and the defeasance was surrendered; but it was verbally agreed, that the defendant should sell the farm, and the plaintiff should have what he received over $800, after paying him for his time and trouble. The defendant accordingly sold the farm at auction, and himself became the purchaser. Held, the transaction constituted a mortgage, with power of sale, and the plaintiff was entitled to redeem.[1]

12. And the same point seems to be determined in connection with the question of title, when claimed under a sale by the mortgagee. Thus a second mortgage was made, subject to the first, to secure a sum specified, and also future advances, with a proviso that, unless payment should be made within fourteen days after demand, it should be lawful for the mortgagee, and he was thereby required, to sell the premises either absolutely or conditionally, or to lease them for any number of years, at such rents as he might think proper; and, from the proceeds, first, to pay the expenses of sale, then the first mortgage, unless the sale were made subject thereto, then the second mortgage, and the surplus to the mortgagor. It was covenanted, that the mortgagor should join in the sale, and execute the conveyance; but further declared, that this should not be necessary to perfect the title, but that it was intended only for the satisfaction of the purchaser. Upon a bill in equity, by an assignee of the mortgage, to enforce an agreement to purchase the premises; it was held, by Sir William Grant, that the de-

[1] Hobson *v.* Bell, 2 Beav. 17.

fendant could not require that the mortgagor should be a party to the conveyance; the covenant to that effect being a mere contract between the parties to the mortgage; and that the power of sale was not in any way inconsistent with the nature of the transaction as a mortgage.[1]

13. In Sanders *v.* Richards,[2] a legal mortgage with a power of sale was created by an administrator, in favor of one who held the title deeds, by way of deposit from the intestate, to secure a debt from the latter, and a sum advanced to the administrator. The mortgagee files a bill against a purchaser for specific performance. Held, the administrator and *cestuis que trust* must be made parties. But the notice required by the power of sale need only be given to the mortgagor and those claiming under him, and not to those claiming by paramount title to him, but subject to the mortgage; even though they may have a right to redeem, and to an account of the proceeds of sale.[3]

14. The sale may be made upon special conditions, if not of a depreciating character.[4] It has been said, that if the power is sought to be exercised for exorbitant purposes, without due regard to the interests of the parties, the Court will interfere; but not without a deposit of the sum to which the mortgagee is entitled.[5]

15. Where a power of sale is reserved, with a direction that the surplus produce shall be paid to the mortgagor, his executors and administrators; if a sale occurs in the lifetime of the mortgagor, the surplus is personal estate, if after his death, real estate.[6] (*d*)

16. It is remarked by Mr. Coventry,[7] that a power of sale,

[1] Corder *v.* Morgan, 18 Ves. 344.
[2] 2 Coll. 568.
[3] Major *v.* Ward, 5 Hare, 598.
[4] Hyndman *v.* Hyndman, 19 Verm. 9.
[5] Matthie *v.* Edwards, 2 Coll. 465; Coote, 174, 175.
[6] Wright *v.* Rose, 2 Sim. & Stu. 323.
[7] 1 Pow. 61 *a*, n.

(*d*) In New York the surplus goes to heirs, and is assets. Moses *v.* Murgatroyd, 1 Johns. Ch. 119.

not coupled with an interest, would not perhaps authorize *a power to lease;* but, as the mortgagee after default becomes absolute owner, with power to sell and convey in fee, perhaps he may make a lease, which is a sale *pro tanto*. That a power to sell implies a power to *mortgage*, which is a conditional sale, is asserted in the text; but there is an obvious difference between the case alluded to and the one here contemplated. A power to sell may by possible construction be held to authorize a sale only; and it may be contended that the mortgagee is authorized to sell and not to lease, so as to bind the mortgagor, except in cases of necessity. The power of sale in a mortgagee is construed rigidly, and will not, it is apprehended, warrant the exertion of any power not definitely expressed. These powers are not ordinary powers operating by means of limitation of use, but *trusts*, declared on the legal estate in the mortgagee, giving him powers more extensive than he will have as mortgagee. As to all powers therefore not expressly given, he must remain as an ordinary mortgagee, and can lease only in case of necessity. (*e*)

17. But, on the other hand, a lease made by the parties subsequently to the mortgage will not of itself affect the mortgagee's right to sell the property under the power. Thus a mortgagor and a mortgagee with a power of sale joined in demising to a receiver, upon trust, at the request of the mortgagee during the continuance of the security, and at the request of the mortgagor, subsequently, to lease in such man-

---

(*e*) Where a power to sell is given, not for any special object, it includes the power to mortgage. Sampson *v.* Williamson, 6 Tex. 102. See Albany *v.* Bay, 4 Comst. 9. Powers are sometimes *executed by*, as well as *contained in*, a mortgage. Upon this subject it is said, the execution of a power by way of mortgage, whether in fee or for years, is but an appointment *pro tanto*, unless there be on the face of the instrument, or from a comparison of the wording of different instruments of mortgage, an indication of an ulterior intention, inconsistent with a future exercise of the power; and the right of redemption will remain in the persons entitled to the estate in default of appointment. Coote, 82.

ner as the person making such request should appoint, but to permit the mortgagor to receive the rents until default, and after default to receive the rents, towards the interest. Held, these trusts, though not declared to be subject to the power of sale, were so in effect, and the receiver was bound, without the concurrence of the mortgagor, to join in conveying to a purchaser from the mortgagee under the power.[1]

18. The power of sale does not change the *redeemable* character of a mortgage.[2] This point, with others relating to the general subject, was fully illustrated in a case in Massachusetts,[3] where it was contended, that the insertion of a power of sale, in a deed which in other respects had the form of a mortgage, so far changed the nature of the mortgagee's interest, that, contrary to the general rule, it was subject to attachment by his creditors. Upon the general subject, Parker, C. J., remarks as follows: — "It is contended by the plaintiff, that *this power to sell* so alters the character of the conveyance, as to deprive it of the qualities of a mortgage, or else superadds qualities which enlarge the estate in Whiting, so as to render it subject to his debts by attachment and levy. We have not seen any authorities which will justify us in adopting this opinion; on the contrary, all the authorities cited have a tendency to show, if they do not distinctly decide, that where the transaction between the parties to the conveyance is in truth and in fact a security for debt or loan, it shall have all the attributes of a mortgage, notwithstanding there may be an unlimited power to sell. Conveyances of this kind are invariably thus treated in chancery, and even when the parties have attempted in that form of conveyance to deprive it of the character of a mortgage, still if it appear to have been a security for debt, the Court will let the debtor in to redeem. So if there be a limited period within which the mortgagor shall redeem, as during his life, his heir shall

[1] King *v.* Heenan, 27 Eng. Law & Eq. 470.

[2] Turner *v.* Bouchell, 3 Har. & J. 99.

[3] Eaton *v.* Whiting, 3 Pick. 490, 492.

nevertheless be allowed to redeem, (Howard *v.* Harris, 1 Vern. 192.) And if there be an agreement to make the conveyance absolute upon payment by the mortgagee of a further sum, if the money lent be not paid at the day appointed, yet the mortgagor may redeem in spite of this agreement. For where the real transaction is security for a loan, the law deems all restrictions upon the right to redeem, unconscionable advantages taken by the creditor of the necessities of the debtor. (Manlove *v.* Bale, 2 Vern. 84; Co. Lit. 203, Butler's note, 96.) An instrument of conveyance, therefore, which appears on the face of it, or by contemporaneous instruments, to be intended as security for the payment of a debt, or the performance of other conditions, does not lose this character while the estate remains in the hands of the grantee, although he may have power to convey the estate free from such incumbrance. A power to sell, *executed* to one who relies upon such power, and expects and intends to purchase an absolute estate, will without doubt pass an unconditional estate to the purchaser, though this form of conveyance is rare in this country. But while the power remains unexecuted, the relation of mortgagor and mortgagee subsists, if that was the relation created by the instrument separate from the power; but even under such a power, it has been held in England, that if the purchaser knows the original nature of the transaction, and appears not to have purchased wholly without reference to the conditional character of the title, he will be compelled in equity to surrender it, on receiving the money he has advanced. (See Croft *v.* Powel, 2 Com. 603.) A power in the mortgagee to sell, unexecuted, leaves the estate as it would be if no such power existed. The right of *redemption*, which is the true *indicium* of a mortgage, remains in the mortgagor and his representatives, until it shall be foreclosed by entry or judgment, with possession as prescribed by law, or until, availing himself of his power, the mortgagee shall have made a conveyance pursuant to it, to some one who shall intend to purchase an irredeemable estate."

19. Various causes are sufficient to invalidate the summary proceeding of selling under a power. Though the mortgagor alone can raise this objection;[1] and he cannot make it to the prejudice of an innocent purchaser, under the terms of the power. Thus, where there was a recorded mortgage, with a power of sale, and an unrecorded agreement between the parties, that the sale should be deferred in consideration of the payment of interest; it was held, that an innocent purchaser at the sale under the mortgage was not affected by the agreement; and that the mortgagor's possession was not implied notice of it.[2]

20. No title passes, unless the essential requisites of the power are strictly complied with.[3] As where there is an omission to record an affidavit of sale, as provided in the deed;[4] or where the advertisement of sale stated that it was to be made in one year, when it was intended to be, and actually occurred, in the following year; or where the advertisement represented the lot to be sold as very much larger than the true quantity, although including the lot mortgaged.[5] So, where a notice of sale was not signed, contained the name neither of the mortgagee nor mortgagor, nor a correct reference to the records, nor the name of the auctioneer; held, the sale was invalid.[6] So, where there were but two mortgages, and the advertisement represented that there were three. So, where no place was named, and the mortgagor was under twenty-five years of age.[7] But where a deed empowered the grantees to sell certain real estate, first giving thirty days' public notice of the sale, and the notice was published five successive weeks in the newspaper, thirty days having elapsed between the first publication and the day of sale; it was held, that such notice was sufficient.[8] So, where the advertisement was not signed by the mortgagee, and described the land merely by a number upon a plat, which,

[1] Benham *v.* Rowe, 2 Cal. 387.
[2] Beatie *v.* Butler, 21 Mis. 313.
[3] Ormsby *v.* Tarascon, 3 Litt. 404.
[4] Smith *v.* Provin, 4 Allen, 516; Roarty *v.* Mitchell, 7 Gray, 244.
[5] Fenner *v.* Tucker, 6 R. I. 551.
[6] Hoffman *v.* Anthony, 6 R. I. 282.
[7] Burnet *v.* Denniston, 5 John. Ch. 35.
[8] Leffler *v.* Armstrong, 4 Iowa, 482.

however, was recorded, the sale was held good.[1] So, where the power required thirty days' notice of sale; held, that a sale thus notified may be adjourned for a week, or from time to time, upon proper notice, if done in good faith, without another thirty days' publication.[2] So, where the sale was advertised to be at "the town of St. Joseph," which town was small, and nearly all the business was done on or near the spot where the sale really took place, and there was no sacrifice of the property proved to have grown out of the vagueness of the description; it was held sufficient.[3]

21. If the power authorizes a sale of the whole land, or such part as may suffice to discharge the instalments then due, a sale for instalments *due and to become due* is void.[4] So a mortgage was payable by instalments, with a power of sale upon non-payment of any instalment of principal or interest for thirty days after it fell due; the surplus proceeds to be paid to the mortgagor, after deducting interest and costs, and the whole mortgage debt. Held, this provision was only intended to authorize a statute foreclosure, upon non-payment of the instalments within the time fixed, with a right to retain for the whole debt, if the instalment and costs were not paid before the sale; but did not make the whole debt due and payable by a mere neglect to pay the instalment within the time prescribed.[5]

22. It has been sometimes held, that, if the mortgagee himself purchases the estate, the sale is void.[6] More especially, if the mortgagor makes the mortgagee his *attorney*, to sell the land, that the latter can acquire a valid title only through a third person, and with the consent of the mortgagor.[7] But other cases decide, that, in the absence of fraud or unfairness, the mortgagee may purchase, either directly or through another person.[8]

[1] Fitzpatrick *v.* Fitzpatrick, 6 R. I. 64.

[2] Richards *v.* Holmes, 18 How. 143.

[3] Beatie *v.* Butler, 21 Mis. 313.

[4] Ormsby *v.* Tarascon, 3 Litt. 404.

[5] Holden *v.* Gilbert, 7 Paige, 208. See Richards *v.* Holmes, 18 How. 143.

[6] Middlesex, &c. *v.* Minot, 4 Met. 325; Howard *v.* Ames, 3 Ib. 311; Benham *v.* Rowe, 2 Cal. 387. See Hyndman *v.* Hyndman, 19 Verm. 9.

[7] Dobson *v.* Racey, 4 Seld. 216.

[8] Richards *v.* Holmes, 18 How. 143; Howard *v.* Davis, 6 Tex. 174.

23. Upon a bill in equity, to enforce performance of a purchase made by the defendant of a mortgaged estate, sold by the plaintiff under a power in the mortgage, which power was to arise upon default made in paying the instalments of the debt; it was held, that the unsupported declaration of the plaintiff, an interested party, was not sufficient proof that the event had happened, on which the right of exercising the power of sale was to arise.[1]

23 *a.* A power of sale is irrevocable. It is held not to cease with the death of the mortgagor.[2] (*f*) But the power is extinguished by payment of the mortgage, even as against a *bonâ fide* purchaser.[3] The Court say:[4] — "There must be a power. Payment extinguishes it; and the case becomes the same as if none had ever been inserted in the mortgage." (*g*) So, where a subsequent mortgagee has tendered the amount of debt and costs due upon a prior mortgage, a sale under a power in such mortgage is void.[5] So where after the debt became due, the mortgagee, under a power of

[1] Hobson *v.* Bell, 2 Beav. 22.
[2] Bergen *v.* Bennett, 1 Caines' Cas. in Er. 1; Beatie *v.* Butler, 21 Mis. 313.
[3] Cameron *v.* Irwin, 5 Hill, 272.
[4] Ibid. 276.
[5] Burnet *v.* Denniston, 5 Johns. Ch. 35.

(*f*) The contrary has been held in Texas, upon the ground that such power is "inconsistent with the statute concerning the settlement of estates." Robertson *v.* Paul, 16 Tex. 472. The transferee of a mortgage in fee, containing a power of sale exercisable by the mortgagee, "his heirs, executors, administrators, or assigns," died intestate. The personal representative of the intestate contracted to sell the estate, and procured a conveyance of the legal estate from the heir, upon trust for the personal representatives for the time being of the intestate, and to be disposed of as they should direct. Held, that he could make a good title to a purchaser. Saloway *v.* Strawbridge, 35 Eng. Law & Eq. 447.

Where a power-of-sale mortgage was made to A., *his administrator* and assigns; held, after the death of A., his administrator had power to sell, the power being coupled with an interest, and irrevocable, and the administrator specially named. Collins *v.* Hopkins, 7 Clarke, (Iowa,) 463.

(*g*) So in Wood *v.* Colvin, (2 Hill, 566,) it was held, that payment of a judgment extinguished the power to sell under it.

sale, sold a part of the property for enough to pay the debt and expenses; his title to the property was thereby extinguished, and a sale of the remaining part held invalid.[1]

25. A sale which passed no title, made under a power, was held an assignment of the mortgage debt, to the amount of the purchase-money.[2]

26. Where a mortgage contains a power of sale, and, in consequence of the sale not being made *bonâ fide*, the proceeds are insufficient to pay the debt, no action can be maintained for the balance of such debt.[3]

27. A. made a mortgage to B., with a power of sale; and a second mortgage to C., which referred to the previous mortgage, and contained, amongst other covenants, one for further assurance, "subject as aforesaid." B. sold the estate under his power, and A. became the purchaser, and took a conveyance to himself from B. The purchase-money was not sufficient to pay the first mortgage. Held, the estate remained liable in A.'s hands to C.'s mortgage, and the effect of the transaction was nothing more than a payment of the first mortgage for the benefit of the inheritance. And this although there had been an intervening purchaser, who had transferred the benefit of his contract to A.[4]

28. A defendant to a creditor's suit, being made a party as mortgagee, with power of sale, and also as claiming to be entitled to two other mortgages on the estate, which were set aside, sold under his power, and received the purchase-money. Ordered, that there should be an account of the purchase-money, and of what was due to the defendant for principal, interest, and costs, as mortgagee, other than the costs of the suit; and payment of the balance to the plaintiffs. The defendant had no right to retain generally his costs of suit.[5]

29. Where a provision is inserted in a mortgage, conferring a power of sale upon the mortgagee, or a third person,

[1] Charter *v.* Stevens, 3 Denio, 33.
[2] Grosvenor *v.* Day, 1 Clark, 109.
[3] Howard *v.* Ames, 3 Met. 308.
[4] Otter *v.* Vaux, 39 Eng. Law & Eq. 611.
[5] Wickenden *v.* Rayson, 39 Eng. Law & Eq. 92.

it is not requisite for the validity of the deed, that the mortgagee or third person should join in the execution, or sign or acknowledge the same, or signify his willingness to make the sale or undertake the execution of the power, by any formal writing indorsed on the deed.[1] (*h*)

[1] Leffler *v.* Armstrong, 4 Iowa, 482.

(*h*) This subject has in some of the States been regulated by statute. In Massachusetts, (Gen. Sts. 716,) where a mortgage contains a power of sale, and a conditional judgment is rendered, the demandant, instead of a writ of possession, may have a decree for sale under the power, giving such notices as are required by the deed or the Court. If the mortgagor was unmarried when the deed was made, or his wife released dower, the sale bars dower. A transfer by the mortgagor does not affect the power. And the sale bars dower, if released in the mortgage, or if the mortgage was given before marriage. In Mississippi, the mortgagee cannot sell without six months' notice. Miss. St. 1840, 28, 29; Hutch. 625. In Michigan, where he has a suit pending. Mich. Rev. Sts. 499. In the same State, and in New York, the mortgagee is authorized to purchase the estate himself, if it be done fairly. Ibid. 2 N. Y. Rev. Sts. 546, St. 1842, ch. 277, § 8. In Michigan, later statutes provide, that every mortgage of real estate, containing a power of sale, upon breach of condition, may be foreclosed by advertisement as follows: —

No proceeding shall have been instituted at law, to recover the debt; or such suit must have been discontinued, or an execution upon the judgment returned unsatisfied in whole or in part. The mortgage and all assignments thereof must have been duly recorded. If the debt is payable by instalments, each instalment after the first shall be deemed a separate and independent mortgage, which may be foreclosed, as if the sale were made upon an independent prior mortgage.

Notice that such mortgage will be foreclosed by a sale of the mortgaged premises, or some part of them, shall be given, by publishing the same for twelve successive weeks, at least once a week, in a newspaper printed in the county where the premises, or some part of them, are situated, if there be one; if not, then in a paper published nearest thereto.

Every such notice shall specify: 1. The names of the mortgagor, mortgagee, and assignee of the mortgage, if any; 2. The date of the mortgage, and when recorded; 3. The amount claimed to be due thereon at the date of the notice; and, 4. A description of the mortgaged premises, conforming substantially with that contained in the mortgage.

The sale shall be at public vendue, between nine o'clock in the forenoon

and sunset, at the place of holding the Circuit Court within the county in which the premises, or some part of them, are situated, and shall be made by the person appointed for that purpose in the mortgage, or by the sheriff, under-sheriff, or a deputy-sheriff of the county.

Such sale may be postponed from time to time, by inserting a notice of such postponement, as soon as practicable, in the newspaper in which the original advertisement was published, and continuing such publication until the time to which the sale shall be postponed, at the expense of the party requesting such postponement.

If the mortgaged premises consist of distinct farms, tracts, or lots, they shall be sold separately, and no more farms, tracts, or lots shall be sold than shall be necessary to satisfy the amount due, at the date of the notice of sale, with interest, costs, and expenses.

The mortgagee, his assigns, or his or their legal representatives, may, fairly and in good faith, purchase the premises or any part thereof.

The person making the sale shall forthwith execute and deliver a deed, specifying the precise consideration, and shall indorse thereon the time when such deed will become operative, in case the premises are not redeemed, and deposit the same with the Register of Deeds. Unless the premises shall be redeemed within the time limited, such deed shall become operative, and may be recorded, and shall vest in the grantee all the right which the mortgagor had at the time of the execution of the mortgage, or at any time thereafter; not affecting, however, any prior lien.

If the mortgagor, his heirs, &c., or any person lawfully claiming from or under him or them, shall within one year from such sale redeem the premises sold, or any distinct lot or parcel thereof separately sold, by paying to the purchaser, his executors, administrators, or assigns, or to the Register of Deeds, for the benefit of such purchaser, the sum bid, with interest at the rate of ten per cent. per annum; such deed shall be void.

Upon payment to the Register, or upon delivering to him a certificate of payment, signed and acknowledged by the person entitled to receive payment, and certified by some officer authorized to take the acknowledgment of deeds; such Register shall destroy the deed, and shall enter, in the margin of the record of such mortgage, a memorandum that it is satisfied, in whole or in part, as the case may be; under penalty, against any person entitled to receive such moneys, who shall refuse to make such certificate, of one hundred dollars damages, over and above all actual damages.

If, after such sale, there remain in the hands of the person making the sale, any surplus money, after satisfying the mortgage and the costs and expenses, the surplus shall be paid over, on demand, to the mortgagor, his representatives, or assigns.

Any party, desiring to perpetuate the evidence of such sale, may procure: 1. An affidavit of the publication of the notice of sale, and of any notice of postponement, to be made by the printer of the newspaper, or by

some person in his employ knowing the facts; and, 2. An affidavit of the sale by the person who acted as auctioneer, stating the time and place, the sum bid, and the name of the purchaser. Which affidavits may be taken and certified by any officer authorized by law to administer oaths; and shall be recorded at length by the Register of Deeds; and such original affidavits, the record thereof, and certified copies of such record, shall be presumptive evidence of the facts therein contained. Comp. Laws, Michigan, 1857, p. 1363.

In New York, the affidavit of sale, without deed, will perfect the title. The power must be registered or recorded, and the sale has the effect of a foreclosure, as to the mortgagor, and all claimants subsequent to the mortgagee. Ub. Sup. The statutes of Maine and Maryland contain similar provisions. Maine, St. 1838, ch. 333. In Wisconsin, the power to lease of a tenant for life, or the power of a married woman, is not extinguished or suspended by mortgage, but the power and the land are bound thereby. A power of sale vests in an assignee of the mortgage. Wis. Rev. Sts. 326.

In Iowa, deeds of trust of real or personal property may be executed as securities for the performance of contracts, and sales made in accordance with their terms are valid. Or they may be treated like mortgages, and foreclosed by action in the District Court. No deed of trust, or mortgage, with power of sale on real estate made after the first day of April, A. D. 1861, for the security of the payment of money, shall be foreclosed in any other manner than by proceeding in the District, State, or Federal Courts.

Nothing herein contained is intended to prevent parties from fixing their own terms to any contract, and prescribing the manner in which those contracts shall be enforced; nor to change the rule, or affect the rights of the vendor of real estate, in those cases where time is of the essence of the contract. Rev. Stat. Iowa, 1860, p. 653.

In the State of New York, the whole subject of powers has been precisely regulated by minute statutory provisions. Many of these relate particularly to the power of sale in mortgages; and various points have been decided by the courts, which are rather of local than general application. In an early case, (Bergen *v.* Bennett, 1 Caines's Cas. in Err. 1,) a mortgage was foreclosed under a power of sale, and after sixteen years' acquiescence, knowing the sale, the mortgagor was denied the right of redeeming.

A power of attorney to execute a mortgage authorizes the attorney to insert a power of sale, on default of payment. Wilson *v.* Troup, 2 Cow. 195.

This does not change the nature of the instrument, or increase the security beyond what is implied in the word "mortgage." Ibid.

A power to give a *mortgage* means the instrument commonly used as such, in the place where the power is to be executed. Ibid.

In New York, mortgages generally contain a power of sale or summary foreclosure; and a power by a citizen of Pennsylvania to execute a mortgage in New York implies authority to insert such power. Ibid.

The provision of the Revised Laws, (p. 374,) that before execution of a conveyance under a power of sale, such power shall be recorded, is for the benefit of the purchaser; and designed to protect him against subsequent purchasers, &c. But the mortgagor cannot object the want of such registration. Ibid.

It is not necessary to the validity of a mortgage or a purchase under a power of sale therein, even as against subsequent purchasers, &c., that the power to execute it be registered according to the statute. 1 R. L. 273, § 2. Ibid.

If a mortgagee convey part of the mortgaged premises with warranty, and afterwards himself purchase the whole under the power of sale; the purchase will enure to the benefit of his grantee. Ibid.

A general assignment divests the mortgagee's interest so effectually, that a foreclosure by the assignee is valid as against the mortgagee, without using his name, giving him notice, or in any way recognizing his connection with the mortgage. Ibid.

A sale under a power, pursuant to the statute, is equivalent between the parties to it to sale under a decree of chancery. The mortgagees (1 R. L. 375, § 10) are entitled to become purchasers at such sale, and, as between them and the mortgagor, the estate passes upon such purchase, without the execution of any deed of conveyance. Slee *v.* Manhattan, &c. 1 Paige, 52; Bergen *v.* Bennett, 1 Caines's Cas. in Err. 1; 7 Johns. Ch. 144; 10 Johns. 185; 4 Cow. 266.

Where there was a conveyance in trust, with a power of sale, and at the same time a conveyance to the same grantee of other land in trust for another *cestui*, with a similar power, and the grantee mortgaged back the whole to secure the unpaid part of the purchase-money of both parcels; the mortgage was held valid. Coutant *v.* Servoss, 3 Barb. 128.

In New York, a power of sale in a mortgage, so far as it relates to the equity of redemption, or the surplus value of the property over the debt, is a power in trust; and any collusive agreement by the mortgagee with a third person, to execute the power in such manner as to deprive the owner of the equity of the benefit intended for him, by the statute, respecting a notice of the sale, or by which he may be deprived of the benefit of a fair competition at the sale, is a fraud upon his rights; and, in case of such an agreement, for the purpose of enabling the third person to obtain the estate for less than its value, and to defraud the owners of the equity, the sale will be set aside upon a bill filed in chancery. Jencks *v.* Alexander, 11 Paige, 619.

A power of sale, is a power coupled with an interest, and, it seems, a power *appendant*. It passes with an assignment of the mortgage, but not by a conveyance of part of the estate. Ibid.

Under the Revised Statutes, as amended in 1844, there are three things necessary to a valid sale under a power. The notice of sale must be pub-

lished for a specified time in a specified newspaper; a copy of such notice must be affixed in a specified place a certain period before the time of sale; and a copy must be served on the mortgagor or his personal representatives, &c., at least fourteen days before the time of sale. Harris, J., King *v.* Duntz, 11 Barb. 191.

Where a mortgage is executed by a husband and wife, and the wife survives the husband, she is entitled to notice of sale; otherwise she is not barred; and the heirs of the husband may take the objection. Ibid.

In case of the death of the mortgagor, notice need not be served upon his heirs. Ib.

CHAPTER VIII.

NATURE OF THE TITLE AND ESTATE OF THE MORTGAGOR.

1. The mortgagor remains the real *owner*, till breach of condition, entry of the mortgagee, or foreclosure.
2. Remarks of judges and elementary writers upon this subject.
5. Qualifications of the general rule; how far the mortgagee may be called *owner*.
6. A mortgage is not an *alienation* of the land, or revocation of a devise.
15. Mortgagor may maintain a real action, as owner.
16. And gains a *settlement*, and other civil privileges.
17. His possession is not *adverse*.
18. The mortgagee, in general, has the right of immediate possession.
20. When he has not this right; agreement for the possession of the mortgagor, how proved; when implied; mortgages for support, &c.

1. It has been stated, (ch. 1) that, after breach of the condition of a mortgage, the mortgagor ceases, *at law*, to have any interest in the estate, his only remaining title being that which is recognized in a court of equity alone, and therefore styled an *equity of redemption*. (*a*) In the language of a recent case,

---

(*a*) Childs *v.* Childs, 10 Ohio St. 342. Blackstone says: — "The payment of principal, interest, and costs ought, at any time, before judgment executed, to have saved the forfeiture in a court of law, as well as in a court of equity. And the inconvenience, as well as injustice, of putting different constructions in different courts upon one and the same transaction, obliged the parliament at length to interfere, and to direct by the statutes 4 & 5 Anne, ch. 16, and 7 Geo. 2, ch. 20, that, in the cases of bonds and mortgages, what had long been the practice of the courts of equity, should also for the future be followed in the courts of law." 3 Bl. Comm. 435. It is said, (King *v.* Edington, 1 E. 288,) though after breach of condition the estate of the mortgagee became absolute at law, "neither courts *of law* nor equity lost sight of what the parties intended." It has been held, that a mortgage, in South Carolina, does not convey the legal title, and the fee remains in the mortgagor, even after condition broken. Thayer *v.* Cramer, 1 McC. Ch. 395. But see Stoney *v.* Shultz, 1 Hill, Ch. 464. See also Evertson *v.* Sutton, 5 Wend. 295. The marked change in the law upon this subject is significantly shown by the remark of Comyns, that, "till redemption, the estate is in the mortgagee, by law *and equity*." Com. Dig. *Chancery*, 4 A. 1.

even before breach of condition, "the mortgage is a conveyance. It is, as between the parties, the present conveyance of a fee, defeasible upon the payment of money or the performance of some other condition."[1] And, more especially, "after the law day is passed, the mortgagee is to be regarded as the owner.[2]" It now becomes necessary, however, to remark further upon this subject, that only as between the parties to the transaction do these results follow from a breach of the condition of a mortgage. It is the well-settled modern doctrine, that, except so far as the relative rights and duties of mortgagor and mortgagee between themselves are concerned, or in reference to all strangers or third persons, who may be connected with or interested in the mortgaged estate; until the mortgagee enters for breach of condition, (*b*) and in many respects until final foreclosure of

[1] Per Shaw, C. J., Richards *v.* Chace, 2 Gray, 385. Acc. Kimball *v.* Lockwood, 6 R. I. 139; Goodman *v.* White, 26 Conn. 322.

[2] Per Redfield, Ch. J., Wright *v.* Lake, 30 Verm. 207.

(*b*) In a late case it is held that the mortgagor remains the real owner, till the proceedings for foreclosure are finally closed; that the title passes to the mortgagee only by the *recording of the affidavits* of sale. Bryan *v.* Butts, 27 Barb. 505; acc. Elfe *v.* Cole, 26 Geo. 197; Wood *v.* Trask, 7 Wis. 566. The mortgagor is owner, before foreclosure or *entry* by the mortgagee. Perkins *v.* Dibble, 10 Ohio, 438; Miami, &c. *v.* Bank, &c., Wright, 249; Ralston *v.* Hughes, 13 Ill. 469. See Norwich *v.* Hubbard, 22 Conn. 587. In New Hampshire it has been said, that the mortgagee might be entitled to notice of the laying out of a highway, and damages, as *owner, by formal entry and notice of his title;* and in any event might have his rights protected in Chancery. Parish *v.* Gilmanton, 11 N. H. 298. See Mass. Sts. 1855, ch. 247; Christophers *v.* Sparke, 2 Jac. & W. 235. The charter of a city provided, that the common council might order the proprietor or proprietors of land and buildings fronting sidewalks or gutters, to level, raise, or form them at their own expense, prescribing a reasonable time therefor; and, if they failed to do it, might themselves procure it to be done, and the expense thereof should then be a lien or real incumbrance on the property, and payment enforced, as upon a mortgage to the city. The council ordered certain works of this nature to be done, opposite premises which were mort-

the mortgage, the mortgagor remains owner of the estate and seised of it, while the mortgagee is held to have a mere lien or security. In terms, "a conveyance of land in mortgage

---

gaged, notifying the mortgagor, but not the mortgagee. Upon failure to do the work, the council caused it to be done, and the expense was ordered to be paid by the mortgagor. Upon his neglect or refusal to pay it, the city files a bill in equity against mortgagor and mortgagee to enforce the lien. Held, the latter was liable to be foreclosed. Norwich *v.* Hubbard, 22 Conn. 587. The mortgagee of land taken for a railroad need not be made a party to proceedings by the mortgagor for the assessment of damages, provided he gives his assent thereto by a writing filed in the case. Meacham *v.* Fitchburg, &c. 4 Cush. 291.

In addition to the two successive stages of title which grow out of a mortgage, arising from *breach of condition* and *entry by the mortgagee;* there is, preliminary to either, the interest of the mortgagor, created by the mere making of the mortgage, *prior to condition broken.* This of course would seem to be a higher and more substantial title than either of the others; constituting, *at law*, what they constitute *in equity.* But, upon mere technical principles, relating to *conditions*, a different doctrine has been sometimes propounded; although, in the present advanced state of the law of mortgages, it would not probably be now sanctioned by any court of law or equity. In Lord Mountjoy's case, Anders. 307; acc. Moore *v.* Plymouth, 3 B. & A. 66, it was held, that a mortgagor cannot effectually make a *reservation* to himself, from a conveyance to a purchaser, of any privilege from the land, as, for instance, that of mining or hunting; because he is not the legal owner. So it is said: — "A mortgagor, before condition broken, has not any equity of redemption — nor — any estate, as distinguished from a mere tenancy, either at law or in equity; clearly not at law, for by the mortgage deed he has conveyed away all his estate, &c., both at law and in equity to the mortgagee; on a condition, it is true, but that a condition, the performance or breach of which a court of equity cannot notice, except as it leads to consequences injurious to one or both of the parties; nor in equity, for a court of equity does not interfere till after the breach of the condition." 1 Pow. 268, n. The same author remarks, that, if a mortgagor before the condition broken devise it, the devise will be void; for a condition is not devisable. But that the cases of Moor & al. *v.* Hawkins, and Row *v.* Jones, which seem to have on solid grounds established the power of testamentary dispositions of possibilities, accompanied with an interest, and of such as would be descendible to the heir of the object of them, dying before the contingent event — appear to be equally applicable in principle to the case of a condition upon a mortgage. 1 Pow. 268.

is a conveyance by deed defeasible on a condition subsequent";[1] enabling the mortgagor to regain a title which has once passed from him, by doing a certain act; but in effect the condition is *precedent*, (*c*) enabling the mortgagee to turn into a legal title that which was before a mere claim or lien, upon the mortgagor's failure to do a certain act.[2] In a late case it is said, "It conveys no title to the property."[3]

2. These general principles have been sanctioned in numerous American and English cases. Thus, property in lease being mortgaged, and the mortgagor becoming bankrupt, the mortgagee notified the tenant to pay rent to him, but it was paid to the assignees. The mortgagee then filed a petition, that the assignees might be ordered to pay him the rent received. In dismissing the petition, Lord Eldon remarked, that admitting the case of Moss *v.* Gallimore to be sound law, he had often been surprised by the statement, that the mortgagor was receiving the rents for the mortgagee. A mortgagee never could in that court make the mortgagor account for the rent for the time past. There was no instance that a mortgagee *per directum* had called on the mortgagor to account for the rents. The consequence is, that the mortgagor does not receive the rent for the mortgagee.[4] (*d*) So

[1] Per Hoar, J., 3 Allen, 339, 340.
[2] See Att. Gen. *v.* Winstanley, 5 Bligh, (New.) 141; White *v.* Whitney, 3 Met. 84; Goodwin *v.* Richardson, 11 Mass. 474, 475; 8 Ibid. 554, Reading of Judge Trowbridge; Hooper *v.* Wilson, 12 Verm. 695; Hall *v.* Savill, 3 Iowa, 37; per Dewey, J., Jenkins *v.* Quincy, &c. 7 Gray, 373.
[3] Per Johnson, J. Bryan *v.* Butts, 27 Barb. 505.
[4] Ex parte Wilson, 2 Ves. & B. 252.

(*c*) In equity, a deed containing a condition, that the title shall not vest in the grantee till payment of the price, constitutes a mortgage. Pugh *v.* Holt, 27 Miss. 461.

(*d*) A lessor mortgaged the property leased, and afterwards assigned the future rent for three years. The mortgage was assigned to the plaintiff, who had notice of the former assignment. The plaintiff brought a bill to foreclose, and a receiver was appointed. Held, the former assignee was entitled to the rent accruing between the commencement of suit and the appointment of the receiver, though the mortgagor was insolvent and the security inadequate. Syracuse, &c. *v.* Tallman, 31 Barb. 201.

Lord Hardwicke says, "The interest of the land must be somewhere and cannot be in abeyance, but it is not in the mortgagee, and therefore must remain in the mortgagor."[1] And Sir Thomas Plumer, M. R., says, "The relation between mortgagor and mortgagee is perfectly anomalous and *sui generis*. The latter acquires a distinct and independent beneficial interest in the estate; he has always a qualified and limited right, and may eventually acquire an absolute and permanent one to take possession, and he is entitled to enforce his right by an adverse suit *in invitum* against the mortgagor."[2] So Lord Manners remarks: — "The person entitled to the equity of redemption is in equity considered as the *owner* of the estate; it descends to his heir, may be the subject of settlement or will, may be limited in the same manner, and those limitations barred in the same manner as those of the legal estate; the mortgagee being but a mere incumbrancer."[3] So Lord Mansfield remarks, in the King *v.* St. Michael's:[4] — "The mortgagee, notwithstanding the form, has but a chattel, and the mortgage is only a security. It is an affront to common sense to say the mortgagor is not the real owner." "A mortgagor has a right to the possession, till the mortgagee brings an ejectment."

3. And the prevailing language of the American courts is to the same effect. Thus, in Massachusetts, Shaw, C. J., says: — "The first great object of a mortgage is, in the form of a conveyance in fee, to give to the mortgagee an effectual security, by the pledge or hypothecation of real estate, for the payment of a debt, or the performance of some other obligation. The next is, to leave to the mortgagor, and to purchasers, creditors, and all others claiming derivatively through him, the full and entire control, disposition, and ownership of the estate, subject only to the first purpose, that of securing the mortgagee. Hence it is, that as between mortgagor and mortgagee, the mortgage is to be regarded as a convey-

[1] Casborne *v.* Scarfe, 1 Atk. 606.
[2] Cholmondeley *v.* Clinton, 2 Jac. & W. 183.
[3] 2 Ball & B. 402.
[4] 1 Doug. 632.

ance in fee; because that construction best secures him in his remedy, and his ultimate right to the estate, and to its incidents, the rents and profits. But in all other respects, until foreclosure, when the mortgagee becomes the absolute owner, the mortgage is deemed to be a lien or charge, subject to which the estate may be conveyed, attached, and in other respects dealt with, as the estate of the mortgagor. And all the statutes upon the subject are to be so construed; and all rules of law, whether administered in law or in equity, are to be so applied, as to carry these objects into effect."[1] And in another case, "although, as between mortgagor and mortgagee, it is a transmission of the fee which gives the mortgagee a remedy in the form of a real action, and constitutes a legal seisin; yet, to most other purposes, a mortgage before the entry of the mortgagee is but a pledge and real lien, leaving the mortgagor to most purposes the owner."[2] In the same State it is said, "while the mortgagor, or any persons under him, are by the mortgagees permitted to remain in possession, and the mortgagees omit to enter, the mortgagor and those who are in under him are, in contemplation of law, taking the rents and profits to his and their own account."[3] (*e*)

4. So, in New York, Chief Justice Kent remarks:[4] — "Mortgages have been principally the subject of equity juris-

[1] Ewer *v.* Hobbs, 5 Met. 3. See Miami, &c. *v.* Bank, &c. Wright, 249; Davis *v.* Anderson, 1 Kelly, 176.

[2] Per Shaw, C. J., Howard *v.* Robinson, 5 Cush. 123.

[3] Per Putnam, J., Mayo *v.* Fletcher, 14 Pick. 531; Clark *v.* Curtis, 1 Gratt. 289. See Cadwallader *v.* Mason, Wythe, 58; Graves *v.* Sayre, 5 B. Monr. 390; Woodward *v.* Pickett, 8 Gray, 617.

[4] Jackson *v.* Willard, 4 Johns. 42.

(*e*) In Maine, the mortgagee is not accountable to the mortgagor for rents, before taking possession, nor the mortgagor to the mortgagee. Chace *v.* Palmer, 25 Maine, 341. See Davenport *v.* Bartlett, 9 Ala. 179. So the mortgagor in possession may make any improvements upon the estate, and the mortgagee's failing to object will not affect his rights. Heath *v.* Williams, 25 Maine, 209.

diction. (*f*) They have been considered in those courts in their true nature and genuine meaning; and the rules by which they are governed are settled upon clear and consistent principles. The case is far different in a court of law; and we are constantly embarrassed between the force of technical formalities, and the real sense of the contract. The language, however, of the modern cases is tending to the same conclusions which have been adopted in equity; and, whenever the nature of the case would possibly admit of it, the courts of law have inclined to look upon a mortgage, *not as an estate in fee*, but as *a mere security for a debt*."

5. Such may be laid down as the existing, settled rule of law upon this subject. It should be stated, however, that a different language is not unfrequently held in the books, with respect to the title of mortgaged premises; speaking of the *mortgagee* as the true owner, more especially where he is in possession,[1] and of the mortgagor, as having a mere equity. It is truly said, "Unless the different purposes to be answered are adverted to, there would appear to be much confusion in the books relative to the rights of the mortgagor and mortgagee; and, with those purposes in view, an attempt to reconcile all the decisions would be made in vain." [2] And Judge Story remarks, that the various language used upon this subject is to be accounted for by the different views which prevail in law and equity.[3] (*g*) Thus, in an-

[1] Lowell *v.* Shaw, 3 Shepl. 342. As to the liability of the mortgagee in possession for *taxes*, see Mass. Gen. Sts. 85.

[2] Per Parker, C. J., Smith *v.* Moore, 11 N. H. 59.

[3] Gray *v.* Jenks, 3 Mass. 521.

(*f*) Courts of law are said to be *mole-blind* as to equities. Peters *v.* Goodrich, 3 Conn. 155.

(*g*) Mr. Powell says: — "The mortgagee is to be considered, both at law and in equity, as the true owner as to all other persons than the mortgagor, or persons who can show a title to compel a redemption. And as to those persons, the mortgagee is to be considered as an indifferent stakeholder, the mortgage not vesting any actual ownership in him, and the estate being in

other case in Massachusetts,[1] it is said, "the mortgagee has the whole estate against all but the mortgagor," while, as has been seen, the general language of the cases is, that *the mortgagor* "has the whole estate against all but" *the mortgagee.* Also, that, "as between mortgagor and mortgagee, the execution and delivery of the mortgage deed transfer the legal estate and vest it in the mortgagee; and the interest of the mortgagor is a right to redeem."[2] And that "a mortgage is an executed contract; a present transfer of title, although conditional and defeasible."[3] (*h*) So it is said by the Court in New Hampshire, that the mortgagor retains only *a power to regain the fee*, and that the condition *as to him* (not the mortgagee) is a precedent one, he being a mere tenant at sufferance, and having no right of possession.[4] (*i*)

[1] Fay *v.* Brewer, 3 Pick. 204.
[2] Root *v.* Bancroft, 10 Met. 471.
[3] Per Shaw, C. J., Barnard *v.* Eaton, 2 Cush. 303.
[4] Brown *v.* Cram, 1 N. H. 171. See also Haven *v.* Low, 2 N. H. 16; Trustees, &c. *v.* Dickson, 1 Freem. Ch. 474.

---

his hands as a mere pledge." 1 Pow. 107, n., 3 Swan. 237. So Mr. Coventry says, 1 Pow. 177, n., "the whole legal estate is in the mortgagee."

(*h*) In the same State, if the seller of land take back a mortgage for the price, which he forecloses, he is to be regarded as the continuous owner, in reference to a dedication of the land as a highway. Wright *v.* Tukey, 3 Cush. 290. Where land is devised subject to the payment of an annuity, and mortgaged by the devisee, the mortgagee becomes personally liable for the annuity, after entering to foreclose, and his liability continues even after he has sold the land. Felch *v.* Taylor, 13 Pick. 133. A mortgage deed will pass the title to a lot included in the description, although the mortgagor himself holds such lot by virtue of a previous mortgage made to him. And if the place referred to manifestly includes this lot, by the numbers of the lots, it will pass with the rest, though a part of the description bounds the land conveyed by land of the former mortgagor. Murdock *v.* Chapman, 8 Gray, 156.

(*i*) In the case of Brown *v.* Cram, 1 N. H. 169, the plaintiff claimed under a mortgage, and the defendant under a subsequent, absolute deed, from the same person; and issue was joined upon the question of freehold title. The plaintiff was proved to have made a formal entry, and subsequently, to have had continued possession. The entry was made before one of the notes secured by the mortgage became due, and after the other became due. Held, the

Also, that a mortgagee *not in possession* is not entitled to be treated as owner, except in a suit or some other proceeding to enforce his rights as mortgagee.[1] So in Connecticut it is held, that the legal title vests in the mortgagee.[2] And, in New Jersey,[3] the mortgagee is said to be seised and take an estate *in præsenti*. The condition is *subsequent*. So, in Ohio, it is held that the title is in the mortgagee after breach of condition, until the mortgage be satisfied.[4] And in Maryland it is said, "Upon the execution of the mortgage, the legal estate becomes immediately vested in the mortgagee, and the right of possession follows as a consequence, subject only to the occupancy of the mortgagor, which is only tacitly permitted until the will of the mortgagee is determined."[5] So in New York, where the owner of an equity of redemption conveys it with warranty, and afterwards takes an assignment of the mortgage and reassigns it; the doctrine of *estoppel* by warranty is held to apply, and the mortgage is extinguished.[6] So, in Kentucky, it has been held that the mortgagor cannot maintain an action on the covenants of warranty in the deed to him, while the mortgage debt remains unpaid; the mortgagee being the legal owner.[7] So, in Indiana, the words "mortgage, assign, and transfer," in a deed, pass the legal title.[8]

6. Upon the ground that the mortgagor is the real owner of the land, a mortgage was early held not to be such an

[1] Great Falls Co. *v.* Worcester, 15 N. H. 412. See Worster *v.* Great Falls, &c 41 N. H. 16.

[2] Chamberlain *v.* Thompson, 10 Conn. 251.

[3] Montgomery *v.* Bruere, 1 South. 268.

[4] Heighway *v.* Pendleton, 15 Ohio, 735.

[5] Jamieson *v.* Bruee, 6 Gill & J. 74.

[6] Mickles *v.* Townsend, 18 N. Y. 575.

[7] McGoodwin *v.* Stephenson, 11 B. Monr. 21.

[8] Gambril *v.* Doe, 8 Blackf. 140. See Speakman *v.* Speakman, 4 Ind. 420.

---

freehold title was in the plaintiff, as much as if he had received an absolute, instead of a conditional deed; the mortgagor retaining merely a power to regain the fee upon performance of a condition precedent. In the same case, it is held, that the purchaser of an equity of redemption has no title in the land before redemption. Brown *v.* Cram, 1 N. H. 172.

alienation (*j*) as to change any previous, revocable disposition of the property; but merely to prevent the owner or his alienee from recovering it, unless they discharged the demand thereby secured. Thus an owner in fee settled his lands by voluntary conveyance to the use of himself for life, remainder to his daughter and heir apparent in tail, remainder to his three brothers in tail, remainder to himself in fee, with power of revocation. Seven years afterwards, he mortgaged in fee to one of the three brothers, who were remainder-men, conditioned, that, if he or his heirs paid the money at the day, he should have the land in his former estate. The mortgage became forfeited, and the mortgagee afterwards purchased of his elder brother, the heir at law. The third brother brings a bill for the third part, by virtue of the limitation of the remainder in tail to him and his two brothers. The question was, whether the mortgage was a total revocation, or only *pro tanto*. Held, the revocation was only *pro tanto*, because the mortgagor was to have the lands, on payment, as in his former estate.[1]

7. The same principle is adopted in regard to a devise, followed by a mortgage, of the land. Thus lands were devised in tail male, remainder to the plaintiff in fee, and afterwards mortgaged in fee. The devisor having died, and the tenant in tail having also died without issue, the plaintiff brought a bill, claiming under the devise to him. Held, though the mortgage was a total revocation of the will at law, it was not so in equity, but the devisee might redeem.[2]

8. Upon the same principle, an agreement, made upon the

[1] Thorne *v.* Thorne, 1 Vern. 141, 182.

[2] Hall *v.* Dench, 1 Vern. 329. See Casborne *v.* Scarfe, 1 Atk. 606; McTaggart *v.* Thompson, 2 Harr. (Penn.) 149.

(*j*) On the other hand, no alienation by the mortgagor can affect the mortgagee's title, or constitute a fraud upon him. As, for example, a sale of the equity of redemption, and an assignment of the rents to a creditor of the mortgagor till foreclosure and sale, and a subsequent collection of the rents by such creditor. Dewey *v.* Latson, 6 Cal. 609; Hodson *v.* Treat, 7 Wis. 263.

sale of land, that the vendee shall not *sell* it without first offering it to the vendor, does not preclude the vendee from *mortgaging* the land to secure a debt, without making such offer. And an absolute deed, with a subsequent defeasance, executed in conformity with an agreement made at the time of giving the deed, constitutes a *mortgage*, not a *sale*.[1] The Court say,[2] "this could not be intended to restrain the defendant from all or any of the uses of his property, incident to the ownership, except on an offer to the plaintiff before a sale and alienation. It could not prevent him from mortgaging it to raise money. This being a security for money, and not a sale or alienation of the estate, we think the *casus fœderis* had not occurred."

9. So a conveyance in fee by the mortgagor, with warranty, or a failure to apply the purchase-money to the mortgage, does not give the right of immediate foreclosure, where by the terms of the mortgage the debt is not due.[3]

10. So, where there is a mere power to sell lands, a power to *mortgage* will not be implied;[4] and it is doubted whether a trustee, appointed by will, with power to sell and dispose of lands in fee-simple or otherwise, may mortgage them.[5]

11. So the act of Congress of 1820, ch. 52, § 7, providing that "no land shall be purchased on account of the United States, except under a law authorizing such purchase," does not prohibit the acquisition, by the United States, of the legal title to land, taken by way of security for a debt, either directly or through the intervention of a trustee.[6]

12. So a mortgage of property insured is not an *alienation by sale or otherwise*, within the meaning of a statute relating to mutual insurance companies,[7] (*k*) or of a prohibitory

[1] Lovering *v.* Fogg, 18 Pick. 540.
[2] Ibid. p. 543.
[3] Colling *v.* Taylor, 16 Ill. 457.
[4] Albany, &c. *v.* Bay, 4 Comst. 9.
[5] Ibid.
[6] Neilson *v.* Lagow, 12 How. U. S. 98.
[7] Conover *v.* The Mutual, &c., 3 Denio, 254; Jackson *v.* Massachusetts, &c., 23 Pick. 418; Rice *v.* Tower, 1 Gray, 426; Howard, &c. *v.* Bruner, 23 Penn. 50; Dutton *v.* New England, &c., 9 Fost. 153; Folsom *v.* Belknap, &c., 10 Fost. 231; Pollard *v.* Somerset, &c., 42 Maine, 221.

(*k*) But, though payable to the mortgagee, under a clause providing that the policy shall be void, if the estate is in *any way* alienated, voluntary in-

clause in the policy, more especially in the absence of any fraud. Even though the mortgage be given on the same day. So, in case of insurance upon property mortgaged, the company agreeing by a memorandum upon the policy to pay the amount insured to the mortgagee with the consent of the mortgagor; the mortgage was afterwards foreclosed, without any act of the mortgagor, to whom the policy was issued. Held, the foreclosure was not an *alienation* which defeated the policy, and that an action might be brought upon it in the mortgagor's name.[1] (*l*) But where one statute provided, that a deed and a defeasance of the same date and executed at the same time should constitute a mortgage; and another act provided, that an absolute deed should not be defeated by a defeasance, unless recorded: it was held, that the omission to record a defeasance made the deed an alienation, which avoided a policy of insurance.[2]

13. The same general rule has received frequent applications, in determining what parties are entitled to notice of special proceedings, to the validity of which notice is by law made necessary. Thus, where a statute provided, that notice of a sale to enforce a mechanic's lien should be given to *the owner of the land;* it was held, that a mortgagee, whose title accrued after that of the mechanic, was not entitled to such

[1] Bragg *v.* N. E. &c., 5 Fost. 289.
[2] Tomlinson *v.* Monmouth, &c., 47 Maine, 232.

---

solvency proceedings of the mortgagor avoid the insurance. Young *v.* Eagle, &c., 14 Gray, 150.

A mortgage of *personal property*, without a transfer of possession, is not such an alienation as will avoid a policy of insurance thereon. Rice *v.* Tower, 1 Gray, 426.

(*l*) But a mortgagee is a *purchaser*, to the extent of his interest in the land, within the Statute of Frauds, (Ledyard *v.* Butler, 9 Paige, 132,) or the recording acts, (Porter *v.* Green, 4 Iowa, 571,) more especially if the consideration is a preëxisting debt, (Work *v.* Brayton, 5 Ind. 596,) or with reference to *secret trusts*, unless there be a distinct notice. Notice to a purchaser at a foreclosure sale is insufficient. Martin *v.* Jackson, 27 Penn. 504. "A mortgage is *pro tanto* a purchase," per Appleton, J. Pierce *v.* Faunce, 47 Maine, 514. La Farge, &c. *v.* Bell, 22 Barb. 54.

notice.[1] But to a bill brought for the purpose of charging an estate with debts, and compelling a conveyance of it, mortgagees are necessary parties.[2]

14. Upon similar grounds, a right of way, appurtenant to land, over and upon adjoining land, is not extinguished by the vesting of both estates in the same person, as mortgagee, under separate mortgages, till both are foreclosed.[3] To effect such extinguishment, it is held, that the party must have a permanent and enduring title to both estates, an unlimited power of disposal, with or without the former incidents of *servitude*, or with new incidents of the same kind; an estate not liable to be defeated by performance of a condition or an event beyond his control, and where the estates cannot again be disjoined by operation of law. "So long as she (the mortgagee) held them, they were both defeasible, upon different conditions, — the payment of distinct debts, and, for aught that appears, to be performed by different persons, because the respective equities of redemption might be held by different persons. So long as she held them, one might have been redeemed and the other foreclosed without any act of hers, and a foreclosure or redemption of either would have entirely effected a separation of the two." The Court further remark, that a redemption reinstates the mortgagor in his original estate, subject to all its former *servitudes*. So in case of foreclosure, the incidents of the estate remain attached to it, unaffected by any act of the mortgagor, as if the conveyance had been originally absolute, and, until foreclosure, the mere entry of the mortgagee upon both mortgages will not effect a merger.[4]

15. Upon the ground that a mortgage constitutes a title when the mortgagee comes into a court to enforce it, but, till then, the mortgagor is the owner,[5] the rule, that a plaintiff in ejectment cannot recover premises, the title to which is in

[1] Howard *v.* Robinson, 5 Cush. 119.
[2] Hoxie *v.* Carr, 1 Sumn. 173.
[3] Ritger *v.* Parker, 8 Cush. 145.
[4] Ibid. 145–147.
[5] Den *v.* Dimon, 5 Halst. 157; Ellison *v.* Daniels, 11 N. H. 274; 1 Pow. 166 *a*, n.; Doe *v.* McLoskey, 2 Ala. 708; Olmsted *v.* Elder, 1 Seld. 144; Fontaine *v.* Beers, 19 Ala. 722.

a third person, does not apply, where the outstanding title is a mortgage. (*m*) And a mortgagor may maintain ejectment against one who claims by a conveyance in fee-simple absolute from the mortgagee. So a mortgagor or purchaser of the equity of redemption may maintain trespass against the mortgagee or one acting under his license, where the defendant pleads *liberum tenementum*, and the plaintiff replies that the freehold was in himself.[1] (*n*)

[1] Jackson *v.* Bronson, 19 Johns. 325; Runyan *v.* Mersereau, 11 Johns. 534; Huckins *v.* Straw, 34 Maine, 166.

(*m*) It is held that the mortgagor's right of action continues *till foreclosure*. So that of all claiming under him. Brown *v.* Snell, 6 Florida, 741. After performance of the condition, the mortgagor cannot maintain an action for the land against a third person, in the name of the mortgagee, though the parties agreed by parol that such suit might be brought. Prescott *v.* Ellingwood, 10 Shepl. 345. In Missouri, where the legal title is in the mortgagee, an outstanding mortgage is sufficient to prevent a recovery in ejectment, and there is no presumption of redemption after a lapse of time. Meyer *v.* Campbell, 12 Mis. 603. If in trespass the defendant plead, that he was possessed of an undivided moiety of certain land, which was flowed by the plaintiff's dam, and that therefore he entered and took it down; a replication, that the plaintiffs were seised of the whole tract in fee and in mortgage, and had the right of possession, and therefore, by means of the dam, caused the water to overflow it, is insufficient, though it might be otherwise if the replication had alleged, that the plaintiffs had before that time entered into possession as mortgagees. Great, &c. *v.* Worster, 15 N. H. 412. Where a defendant, in an action of trespass for cutting down a dam, alleged in his plea, that he was possessed of an undivided moiety of a certain tract of land, flowed by means of the dam, and the plaintiffs replied, that they were seised in fee and in mortgage, and had the right of possession, and issue was taken upon the rejoinder that they had not the right of possession; held, the issue was immaterial, and a repleader was awarded. Ib. In Vermont, the mortgagee and mortgagor of land may be joined in ejectment as defendants, even though the mortgagee never had been in actual possession. Marvin *v.* Dennison, 20 Verm. 662. But he will only be answerable for rents and profits when he has received them; and, if the defendants plead severally, as they may do, judgment may be recovered for the damages against the mortgagor alone. Ib.

(*n*) So a mortgagor, after an assignment for benefit of creditors, may maintain a bill in equity to cancel the mortgage for usury. Strong *v.* Strickland, 32 Barb. 284.

16. Upon the same ground of *ownership*, a mortgagor in possession gains *a settlement*.[1] (*o*) So the mortgagor is re-

[1] The King *v.* St. Michael's, Doug. 632. The *mortgagee*, if in possession, may gain a settlement. The question turns on possession. Barkhamstead *v.* Farmington, 2 Conn. 600; Conway *v.* Deerfield, 11 Mass. 327; Groton *v.* Boxborough, 6 Mass. 50. See Gilsum *v.* Sullivan, 36 N. H. 368; Oakham *v.* Rutland, 4 Cush. 172; Walden *v.* Cabot, 25 Verm. 522.

(*o*) The following cases have been decided upon this point in England. St. 9 Geo. 1, ch. 7, provided, that no person should gain a settlement by purchasing any estate, whereof the consideration was less than £30, *bonâ fide* paid. Hence, if a pauper contract for the purchase of an estate for £39, which is mortgaged for £32, pay £7, and take a deed subject to the mortgage, or if he contract to purchase for £52, and pay but £12, mortgaging to the vendor for the balance, he gains no settlement. Rex *v.* Mattingly, 2 T. R. 12.

But where, after purchasing an estate for the full value, the purchaser obtained from a third person a loan of money, with which he discharged the existing incumbrances, and took an assignment of them, thus acquiring the legal estate, and then mortgaged to secure the loan, and remained in possession forty days thereafter; held, he gained a settlement. Rex *v.* Chailey, 6 T. R. 755; —— *v.* Olney, 1 M. & S. 387; —— *v.* Tedford, Burr. Set. Cas. 57.

The owner of an equity of redemption, having been ejected by the mortgagee, was permitted by him to occupy an untenanted house on the land, for the purpose of overlooking some repairs which he proposed to make, with the intention of selling the property and paying the mortgage, but with no agreement as to rent. Having occupied three months, he was removed as a pauper, not having done anything towards repairing or selling. Held, he gained no settlement, because, though he had an equitable title, he was not legally *in possession*, and had neither *jus in re* nor *ad rem*. Rex *v.* Catherington, 3 T. R. 771. In Massachusetts, where the receipt of a *clear* yearly income from real estate gives the party a legal settlement; if he mortgage it for a sum, the interest of which does not leave to the mortgagor a surplus of the sum required, he gains no settlement. Otherwise, it seems, if the word *clear* were omitted. Groton *v.* Boxborough, 6 Mass. 50.

The Court remark: — "If we do not give the term this effect, the qualification by a freehold estate would be absolutely nugatory; any man involved in debt might mortgage his estate to the full value, so that the interest of his debt should exhaust the whole annual income of his lands. If this was the fact, what reason can be assigned why, for a property so incumbered, he should be admitted to gain a settlement, when in fact the value of his real property is merely nominal. Ib. 54.

quired or entitled to serve as a juror or member of the legislature, or may be received as bail.[1] (*p*) So the mortgagor in possession is liable for *taxes;* and, if the land is sold for taxes, he cannot acquire a title by purchasing it, this being only a mode of paying them.[2] (*q*) Upon the same ground of ownership, the mortgagor may agree upon the boundaries of the land, and thereby bind all persons except the mortgagee.[3]

17. In general, the possession of a mortgagor, or one claiming under him, is not regarded as *adverse* to the mortgagee.[4] "No mortgagor can oust his mortgagee by any entry or by possession of the land."[5](*r*) "Being tenant at will, (the mort-

[1] Montgomery *v.* Bruere, 1 South. 267.
[2] Ralston *v.* Hughes, 13 Ill. 469. See Mass. Rev. Sts. 1853, 942.
[3] Orr *v.* Hadley, 36 N. H. 575.
[4] Hunt *v.* Hunt, 14 Pick. 374.
[5] Per Shaw, C. J., Root *v.* Bancroft, 10 Met. 48; Joyner *v.* Vincent, 4 Dev. & B. 512.

A mortgage, to indemnify a surety for the purchase-money of the land, has the same effect upon the question of settlement, as if made directly to the seller. Conway *v.* Deerfield, 11 Mass. 327.

(*p*) By St. 7 W. & M. c. 25, a mortgagee could not vote for members of Parliament in right of his mortgage, unless in possession or receipt of the rents. The mortgagor, on the other hand, had this privilege. 1 Pow. 170 *a.* See Beamish *v.* The Overseers, &c., 7 Eng. Law & Eq. 485; Moore *v.* Overseers, &c., 14, 295. Under the *game laws*, a mortgagor has been held *an owner*, or, in the words of the statute, to *have* real estate, etc., but the *clear yearly value* of the property must be over and above the interest of the mortgage. Witherell *v.* Hull, Caldecot, 230.

(*q*) In Massachusetts, by St. 1849, 551, a mortgagee, taking possession, was liable for taxes then due. In Maine, (Coombs *v.* Warren, 34 Maine, 89) land cannot be taxed to a mortgagee not in possession, and a sale for non-payment of such tax passes no title. (See, as to the liability of mortgaged premises for a public charge in the nature of a tax, Norwich *v.* Hubbard, 22 Conn. 587.) If mortgaged land is lost for non-payment of taxes, the mortgagee is not responsible for such loss. Harvie *v.* Banks, 1 Rand. 408.

(*r*) On the other hand, the possession of the *mortgagee* under the mortgage before *the law day*, is not adverse to the mortgagor. McGuire *v.* Shelby, 20 Ala. 456. The same principle is applied to the possession of the mortgagee as against a reversioner seeking to redeem. A mortgagee re-

gagor's) possession is not adverse, and any buildings, improvements, or erections placed by the mortgagor upon the land, must be considered as improvements upon the estate mortgaged, made by the mortgagor as owner of the equity of redemption, and cannot be deemed a disseisin. The mortgagor in such case must be considered as making improvements upon his own estate, of which he has the full benefit in the enhanced value of the equity of redemption."[1] So the assignee of the mortgagor cannot hold adversely, but is a mere tenant at will to the mortgagee, unless he purchased without notice of the mortgage.[2] And an absolute conveyance with warranty, by the mortgagor, gives the mortgagee no new rights as to foreclosure.[3] And the same principle, as to the ownership of the property by the mortgagor, has been applied to a question of title between third persons. Thus, where a mortgagor in possession authorized a third person to build a house upon the land, which was afterwards sold on an execution against the latter; in an action brought by the purchaser for the house against one claiming under a sale by the mortgagor, it was held no defence, that the mortgagee did not authorize the erection, and forbade the removal, of the house, as he had a mere lien on the property, if any interest in it, and the result of this suit would not affect his title. A doubt was suggested, whether the mortgagee acquired even a lien upon the house, except for the purpose of securing the rents by taking possession; and whether the building was not the personal property of the builder.[4]

[1] Hunt *v.* Hunt, 14 Pick. 385, 386, per Shaw, C. J. See Nichols *v.* Reynolds, 1 Ang. (R. I.) 30; Smartle *v.* Williams, Salk. 245; Herbert *v.* Hanrick, 16 Ala. 581.

[2] Newman *v.* Chapman, 2 Rand. 93.

[3] Coffing *v.* Taylor, 16 Ill. 457.

[4] Jewett *v.* Patridge, 3 Fairf. 243.

---

mained in possession six years without acknowledgment of the title of the mortgagor, bought out a tenant for life of the equity of redemption, and occupied twenty years more. Held, his occupancy was not adverse during the tenancy for life, and the reversioner might redeem. Hyde *v.* Dallaway, 2 Hare, 528.

18. Although the mortgagee is not regarded as the *owner* of the land, yet, independently of express statute or agreement to the contrary, he has the right of *immediate possession*, which he may enforce either by entry or action.[1] He may enter even by force, and after reasonable notice may remove personal property on the land to some safe and convenient place.[2] Or dig up the soil, without being a trespasser.[3](*s*)

[1] Lackey *v.* Holbrook, 11 Met. 460; Allen *v.* Parker, 27 Maine, 531; Miner *v.* Stevens, 1 Cush. 485; Mansony *v.* United States, &c., 4 Ala. N. S. 745, 746; Hobart *v.* Sanborn, 13 N. H. 226; Harmon *v.* Short, 8 Sm. & M. 433; Walcop *v.* McKinney, 10 Mis. 229; Smith *v.* Taylor, 9 Ala. 633; McIntyre *v.* Whitfield, 13 Sm. & M. 88; Stevens *v.* Brown, Walk. Ch. 41; Wales *v.* Mellen, 1 Gray, 512; Taylor *v.* Weld, 5 Mass. 120; Brown *v.* Leach, 35 Maine, 39; Brown *v.* Stewart, 1 Md. Ch. 87; Forbush *v.* Goodwin, 9 Fost. 321.

[2] Allen *v.* Bicknell, 36 Maine, 436.

[3] 9 Fost. 321.

(*s*) In several of the States, this subject has been regulated by statute. In Massachusetts, the mortgagee's general right of possession is recognized. (Mass. Rev. Sts. 635.) So in Maine, (Me. Rev. Sts. 553; Ruby *v.* Abyssinian, &c., 3 Shepl. 306.) In Vermont, it is provided, that the mortgagor may retain possession till breach of condition, unless the deed clearly show the contrary. So in Wisconsin. Rev. Sts. ch. 78, § 1210. In New York, a statutory provision limits the mortgagee's remedy for possession to a suit upon the special contract, if any, or to a process for foreclosure and sale, after default. 2 N. Y. Rev. Sts. 408. See Syracuse, &c. *v.* Tallman, 31 Barb. 201. In Indiana, the statute of 1843, depriving a mortgagee of the right of possession, has no effect after foreclosure and sale. Jones *v.* Thomas, 8 Blackf. 428. See Morgan *v.* Woodward, 1 Cart. 446; Hanna *v.* Countryman, Ib. 493; Smith *v.* Porter, 35 Maine, 287. In Arkansas, if the mortgagee, contrary to agreement, by process of law obtain possession before breach of condition, he is liable to an action of trespass; and also to the costs of a proceeding in equity instituted for his own relief. Mooney *v.* Brinkley, 17 Ark. 340. In case of such agreement, the mortgagee cannot maintain a process of forcible entry, &c.; but, if the property is depreciating from neglect, may by bill in equity have it committed to receivers. Ib.

Where the bond secured by a mortgage provides, that, if either party shall be dissatisfied with the performance, it shall be submitted, finally, to referees; the mortgagee may lawfully enter for an actual breach, without proving it by such submission. Hill *v.* Moore, 40 Maine, 515.

In some cases of hardship, equity will not aid a mortgagee to maintain a suit for foreclosure, even after breach of condition. Thus A. contracted to convey to B., free of incumbrance. Part of the price was paid, and the balance was to be secured by mortgage, with the right of foreclosure in

And, in an action on the deed, he is not required to show a breach of the condition, or previous notice.[1] So, where the mortgagee has entered before breach of condition without notice, a tenant at will under him may maintain an action of trespass against the mortgagor, for entering upon the premises, and expelling him therefrom.[2] (*t*) So the mortgagor cannot maintain an action of trespass for the entry, against the mortgagee and an officer who entered with him, by opening an outer door in the absence of the mortgagor and his family, without previous notice to quit; although the officer attached the plaintiff's goods upon such writ.[3] Nor can the mortgagor maintain trespass against the mortgagee for entering and carrying away a fixture,[4] or, without a previous entry, entering and removing the soil.[5] So, under the mortgage of a term, conditioned for the payment of a certain sum with interest, at certain periods, with a power to sell after three months' notice, in case of non-payment, and a covenant by

[1] Darling *v.* Chapman, 14 Mass. 104.
[2] Reed *v.* Davis, 4 Pick. 217.
[3] Lackey *v.* Holbrook, 11 Met. 460.
[4] Chellis *v.* Stearns, 2 Fost. 312.
[5] Furbush *v.* Goodwin, 9 Fost. 321.

---

twenty days after the interest should fall due. At the time appointed for the conveyance, the land was subject to the lien of a judgment, but, upon A.'s agreeing to extinguish it, this objection was waived, and the deed and mortgage executed. Interest fell due December 27. December 31, the judgment was cancelled, but without notice to B.; nor was the interest demanded. January 22, B. was notified that the mortgage was due, and the interest was tendered and refused. Held, a bill for foreclosure could not be maintained. Broderick *v.* Smith, 26 Barb. 539.

(*t*) In the case of Reed *v.* Davis, where this point was decided, the counsel for the defendant began to argue, that such notice was required by law; but the Court refused to hear an argument upon the question, saying it was one of the settled points of law that notice was not necessary. In the same case, brought for breaking and entering the plaintiff's dwelling-house, putting out his furniture, and forcibly expelling the plaintiff and his family; the Court refused to set aside a verdict for $500 damages. A mortgagee of slaves, after breach of condition, may lawfully seize them, after night, for the purpose of foreclosure, without violence to the mortgagor, his family or houses. Satterthwaite *v.* Kennedy, (Ct. of Err. S. C.) Law Rep. Aug. 1849, p. 296.

the mortgagor to pay, and that the mortgagee, at any time after default, might enter and take the rents and profits for the residue of the term; the mortgagee may enter before default, and before any day named for payment.[1]

19. But, if the mortgagee enters under a claim adverse to the mortgage title, the mortgagor may maintain an action of trespass against him.[2] (*u*) And an entry by a mortgagee to survey the premises, merely for the purpose of obtaining information respecting the boundaries, or to exercise a power not warranted by the mortgage, as to flow the land by a dam erected on other land belonging to him; is not a possession under the mortgage.[3]

20. An agreement, that the mortgagor may retain possession, must appear by the deed itself, or some other writing; parol evidence of it is insufficient. (*v*) And this doctrine has been applied, even in a case where the mortgage was conditioned to support the mortgagee and his wife, (*w*) and the facts indicated, that the mortgagor's only resource for furnishing such support was in the use of the estate mortgaged. In that case,[4] the Court remark: — "There can be no doubt that the parties intended that the mortgagor should remain in possession, until there was a breach of the condition of the deed. But by the principles of the common law, as well as our own statutes relating to the conveyance of real estate, agreements to that effect must be in writing to be obligatory.

[1] Rogers *v.* Grazebrook, 8 Ad. & El. (N. S.) 895.

[2] Merithew *v.* Sisson, 3 Kerr, 373.

[3] Great Falls, &c. *v.* Worster, 15 N. H. 412.

[4] Colman *v.* Packard, 16 Mass. 39, 40.

(*u*) As to the title of the *heir and executor* of a mortgagee, who dies, after having entered before breach of condition, see Smith *v.* Dyer, 16 Mass. 18.

(*v*) Whether the same courts, which allow a mortgage to be itself created by parol evidence, might not also receive parol proof of an agreement for the mortgagor's continued possession, is a point perhaps deserving of consideration.

(*w*) See, as to the nature of this class of mortgages, *supra*, ch. 6. In a late case in New Hampshire, it is held that a deed thus conditioned is not a mortgage, but a conditional sale. Bethlehem *v.* Annis, 40 N. H. 34.

It is time it was known that contracts like this, where one party conveys his estate to another, in consideration of a support to be furnished by the purchaser, and the latter mortgages the estate for security, will not answer the intended purposes, without a covenant that the mortgagor shall remain in possession. How the parties in this case will adjust the claims of the mortgagee for the stipulated support, when he has obtained possession of the estate out of which it was probably to be afforded, it is difficult to tell. We however cannot make law to suit particular contracts."

21. In a later case,[1] Wilde, J., remarks: — "Such an agreement is usually inserted in English mortgages, and may operate by way of estoppel, covenant, condition, or reservation. Such a clause, inserted in the mortgage deed, or other deed made at the same time, and being part of the same transaction, is undoubtedly binding on the mortgagee, and is to receive a liberal construction, as it generally has an operation beneficial to both parties." And it is remarked by Professor Greenleaf:[2] "Whether, in the absence of any express contract, such agreement (for the possession of the mortgagor) may be implied from the fact alone of the mortgagor being suffered to remain in possession of the premises, or from that fact, and a corresponding usage in the country, is not perfectly clear upon the authorities. As an inference of law, perhaps the Court might not presume it; but would leave the jury to find an agreement or license, if properly pleaded." But it is said,[3] there must be a *necessary* implication, to give the mortgagor an implied right of possession. (*x*)

[1] Flagg *v.* Flagg, 11 Pick. 477. See George's, &c. *v.* Detwold, 1 Md. 225; Chellis *v.* Stearns, 2 Fost. 312.

[2] 2 Greenl. Cruise, 102, n. See Shute *v.* Grimes, 7 Blackf. 1; Sherman *v.* Sherman, 3 Ind. 337.

[3] Hobart *v.* Sanborn, 13 N. H. 226; Wales *v.* Mellen, 1 Gray, 513.

(*x*) In the case of Jamieson *v.* Bruce, (6 Gill & J. 72,) a mortgage was made on the 19th of August, 1831, of certain slaves, with a condition to be void, if the debt were paid on or before September 1, 1832. There was no stipulation for the mortgagor's remaining in possession; but he was allowed thus to remain till November, 1831, when the mortgagee took possession of

It has been held, that such agreement may be implied from a note, made at the same time with, though not referred to in, the mortgage.[1] So, where the mortgagee of a mill gave back to the mortgagor a bond, reciting the privileges which the latter was to have in using the water, dam, &c., covenanting to build machinery in the mill, and that neither he nor others, by his permission, would follow the business while the mortgagor followed it; and reserving the use of a room in the mill for a specified time: it was held that the mortgagor had a right of possession till breach of condition, and that a writ of entry would not lie against him.[2] And, contrary to a case already cited, the weight of authority seems to be, that an agreement for the continued possession of the mortgagor will be implied from the fact, that the mortgage is conditioned for the support of the mortgagee; more especially if it clearly appears that such support is to come from the land. Thus, in case of a mortgage, conditioned to deliver so much of the produce of the land annually, or support the mortgagees during their lives; held, till breach of condition, the mortgagor was entitled to possession, and therefore the actual tenant of the freehold.[3] So, where a farm was mortgaged, upon the condition that the mortgagor should carry it on during the mortgagee's life, and deliver him half the produce; it was held, that the mortgagee might enter to take this part of the produce; but not otherwise, except for waste or breach of condition.[4] So a mortgage,

[1] Clay *v.* Wren, 34 Maine, 187.
[2] Bean *v.* Mayo, 5 Greenl. 89.
[3] Lamb *v.* Foss, 8 Shepl. 240.
[4] Hartshorn *v.* Hubbard, 2 N. H. 453. See ch. 6.

---

the property in the night, in the absence of the mortgagor, who brings this action of trespass against him. The Court were requested to instruct the jury, that, if they found from the evidence, that the plaintiff retained possession with the defendant's consent, and that the property was taken by the defendant, without the plaintiff's knowledge or consent, and without a previous demand, the action was maintainable: but the instruction was refused; and the judgment of the Court below was affirmed.

conditioned to support the mortgagee during his life, on the estate, and keep it in repair; gives no right of immediate possession.[1] So, where there was a conveyance of a farm by a father to his son, with a mortgage back to the grantor and his wife, conditioned that the mortgagor, his heirs, &c., should provide for the maintenance of the mortgagees during their lives; held, it was a necessary implication, nothing appearing to the contrary, that the parties did not contemplate that the mortgagees should take possession and retain it until their decease, while the mortgagor was duly performing, from time to time, those acts to secure the due performance of which the mortgage was executed; and that they could not maintain an action for possession till breach of condition or the commission of waste.[2] (*y*) So the condition of a mortgage was as follows: — "Whereas,

[1] Brown *v.* Leach, 35 Maine, 39; acc. Norton *v.* Webb, Ibid. 218.
[2] Flanders *v.* Lamphear, 9 N. H. 201; acc. Rhoades *v.* Parker, 10 N. H. 83.

(*y*) In the same case it was further held, that the place of performance of the condition was not necessarily the farm itself; but some suitable and convenient place for the mortgagee, and at the same time one which did not impose hardship upon the mortgagor. It should be a reasonable place for both parties. It was further held, that by the transaction between the parties a personal trust was reposed in the mortgagor, and a personal obligation assumed by him, which he could not assign over to third persons, substituting them in his place; and that if he had attempted such transfer, and no longer superintended, at least, the due fulfilment of the condition, the action might be maintained. Ibid. In the subsequent case of Holmes *v.* Fisher, 13 N. H. 9, it was held, that, where a mortgage is made to the husband, conditioned to support him and his wife, his administrator, after his death, must sue upon the mortgage. The wife has no right to enter. If she marry again, and live with her second husband without claiming support under the mortgage, the right is waived, and does not revive till a demand is made. A demand need not be made upon the land, unless by the terms of the deed the support is to be there furnished. She may demand it, notwithstanding her marriage; and she may make the demand upon the administrator of the mortgagor. Her husband cannot participate in the support. If no place is fixed, she must be ready to receive the support at a convenient place.

the above-named Hannah Wales (plaintiff) has this day, by deed, conveyed to the said Nathaniel K., (defendant) the above-mentioned premises, for her future maintenance and support, and, whereas, the said Nathaniel K. has, at the same time, reconveyed the same premises to said Hannah, as security for such maintenance and support. Now, if the said Nathaniel K., his heirs, &c., shall, &c., maintain the said Hannah in sickness and in health, &c., and, at her decease, give her a decent burial, then the above, &c., shall be void," &c. Held, no action could be maintained by the mortgagee for possession before condition broken. By taking the premises from the defendant, the demandant would probably prevent him from carrying into effect the purpose for which alone the mortgage is expressed to be made.[1] (z)

[1] Wales *v.* Mellen, 1 Gray, 512.

(z) Mortgage, conditioned that the mortgagor should support the mortgagees during their lives. The equity of redemption having been transferred, one of the mortgagees, the other being dead, brings an action upon the mortgage for breach of condition. The plea alleges, that the assignee had always offered to support the demandant at his (the assignee's) own house, in a different town from that where the land lay. Upon demurrer to the plea, it was argued for the demandant, that the mortgagees reposed a personal trust and confidence in the mortgagor and his representatives, which was violated by assigning the former to the care of strangers, and that it was to be fulfilled upon the land mortgaged. The tenant contended, that the mortgagee could not claim possession, and thus take the very fund from which her support was to be derived. Held, the mortgagees had a right to be supported wherever they chose to live; not creating needless expense. The demandant, therefore, has a right to possession, unless the mortgagor pray for conditional judgment; in which case an estimate may be made of the time for which the demandant has been left without support. Wilder *v.* Whittemore, 15 Mass. 262. See Gibson *v.* Taylor, 6 Gray 310.

A mortgage was made upon condition to furnish support for the mortgagee and his wife, and the use of one third part of the house upon the land, during their lives. In an action of the mortgagee to recover possession, it was held that the plaintiff could not maintain the action without first proving a breach of condition. To show this, evidence was introduced, that the defendant pushed his mother (the wife of the plaintiff) out of the house,

22. The implied right, of possession of the mortgagor till breach of condition, is often placed upon the specific ground

---

and kicked her after she was out. Held, the action could not be maintained. The Court say: — "A refusal to permit the husband or wife to occupy their third would be a breach of the condition, if the third had been set off; and a forcible ejectment from it, under any pretence of claim, or upon a controversy about the right, would be quite as clear a breach. And if no division had been made, but the parties were living together as tenants in common of the house, it could make no difference. The mortgagor would be no better entitled, in such case, to hold the other parties out, or forcibly turn them or either of them out. If he did either, upon any controversy about the right, or any claim of title, he could not be said to furnish them one third part of the house." But in the absence of any such claim or controversy, the transaction was a mere assault, though an aggravated one, and not a breach of condition. "The condition of the mortgage is not an obligation to keep the peace — even within the house. The obligation to furnish support does not include within it a stipulation to treat with reverence or affection." Dearborn *v.* Dearborn, 9 N. H. 117.

Bond and mortgage, conditioned to support the obligee for life. A bill for foreclosure alleged a breach for the past year; and there were no supplementary pleadings. Held, the plaintiff could not have a decree for breaches subsequent to the commencement of suit; the provisions of the Revised Statutes (2, 192, 193), relating to foreclosure and sale for such instalments, being applicable only to mortgages for the payment of money. Ferguson *v.* Ferguson, 2 Comst. 360. (Three judges dissented.)

A mortgagee, who has taken possession of premises mortgaged for his support, and on breach of condition has for several years supported himself, is entitled to a decree to quiet his title. Frizzle *v.* Dearth, 2 Wms. (Verm.) 787.

A grantee gave to his grantor a bond, in consideration of the deed, conditioned to support the grantor for life; otherwise, to reconvey. Held, not a mortgage, but a contract which equity would specifically enforce. Robinson *v.* Robinson, 8 Gray, 447.

A condition for support is personal to the mortgagor. It cannot be transferred; nor is the land liable to creditors of the mortgagor. If the mortgage in terms includes heirs, executors, and administrators, they are bound by it. A mortgage from the former mortgagor to his creditors is valid, but does not authorize them to perform the condition of the first mortgage. After the death of the mortgagee and mortgagor, unless there had been a previous foreclosure, the property belongs to the mortgagor's estate. Eastman *v.* Batchelder, 36 N. H. 141.

of a *re-demise* from the mortgagee. Thus a mortgage was made, with a proviso for redemption on payment of principal and interest, June 5, 1834, but with an agreement that the principal should not be called in before December 5, 1840, if the interest were regularly paid in the mean time; and that the mortgagor should occupy and take the profits until default. Held, the fee vested in the mortgagee, but the premises were re-demised to the mortgagor till December 5, 1840, if the interest were regularly paid.[1] So a mortgage, made to secure an annuity, conveyed the land in trust, among other things, to permit the mortgagor to receive the rents till a default, for sixty days, in payment of the annuity. Held, the conveyance amounted to a re-demise to the mortgagor till such default, and that a notice to quit, given by him in his own name to a tenant whom he let into possession before the mortgage, was sufficient to sustain ejectment against the tenant on his own demise.[2] So the plaintiff brought an action of trespass against an officer, for breaking and entering his house, and seizing fixtures and goods therein. The plea denied the plaintiff's possession. The defendant also justified under a *fi. fa.* against one Franks, who was a tenant for years, and had demised to the plaintiff, by way of mortgage, for the residue of the term, wanting one day. The plaintiff had not entered. The deed demised to the plaintiff to hold henceforth, (as above stated,) subject to the following proviso. It also conveyed the fixtures, &c., to hold for his own use, &c., with the same condition. The deed also contained provisos for reconveyance upon payment of the debt on the 24th of June, and also, that, upon non-payment at that time, the plaintiff might enter and take the profits, and sell or underlet. There was no covenant that Franks should remain in possession till the 24th of June. Held, the plaintiff had no right of possession till that time, and that the action could

[1] Wilkinson *v.* Hall, 4 Scott, 301.

[2] Doe *v.* Goldwin, 2 Ad. & El. (N. S.) 143. In Doe *v.* Day, 2 Ad. & El. (N. S.) 155, Lord Denman says, in regard to this case: — "It may be questionable whether sufficient attention was paid in that case to the point as to the certainty of the time."

not be maintained.[1] And where the mortgage provides that the mortgagor may enjoy the land, until default in payment by a certain day; although the land is occupied by tenants, the proviso will operate as a re-demise for this period.[2]

23. But on the other hand, it is said, where the proviso is, that the mortgagee may enter and take possession on default of payment at the day; or that he shall not take the profits till default in payment; or, it seems, that the mortgagor shall take the profits until default in payment (no definite time being, in the last case, fixed for payment): the proviso only amounts to a covenant, and the mortgagee may, at any time, bring ejectment without notice, though by the proviso he be required to give notice before entry, or though there be a covenant for further assurance by the mortgagor in case of default in payment.[3]

24. If the mortgagee of a term, where the mortgage provides that the mortgagor may retain possession, assigns the term without the mortgagor's joining or being a party; the latter, from being in the nature of a tenant at will, becomes in the nature of a tenant at sufferance.[4] It is also held, that the mortgagor's continuing in possession would never make a disseisin, for a tenant at sufferance has but a bare possession, and no freehold; that the covenant for the mortgagor's possession governs all assignments of the mortgagee; and, therefore, that an assignee of the mortgage of a term might validly reassign it, notwithstanding such possession, without any reëntry, and without the mortgagor's joining. And the assignee's bringing an ejectment is not to be construed as an election to consider the mortgagor as a disseisor, because the action is brought, not to recover the *term*, but only the *possession*, being the only remedy for this purpose except a forcible entry, which the law forbids.[5]

25. It will be seen, hereafter, that the law has generally

[1] Wheeler *v.* Montefiore, 2 Ad. & Ell. (N. S.) 137.

[2] Wilkinson *v.* Hall, 3 Bing. (N. C.) 508; Powsely *v.* Blackman, Cro. Jac. 659.

[3] Coote, 376; Doe *v.* Day, 2 Q. B. 147; Doe *v.* Lightfoot, 8 M. & W. 553; Rogers *v.* Grazebrook, 8 Q. B. 895.

[4] 1 Pow. 162 *b*; Skin. 423.

[5] Smartle *v.* Williams, Salk. 245.

provided certain specific modes and forms of taking possession, for the purpose of effecting the *foreclosure* of a mortgage. It has been held, however, that, if a mortgagee had a legal right to enter for breach of condition, the entry is lawful, though he entered without executing his purpose, or even for other purposes. Though the entry cannot operate as an entry to foreclose, unless made in the manner prescribed by law; still it is a lawful act.[1] So a mortgagee of an undivided share of land, taking possession, is entitled to his share of the rents and profits, although the entry was made for foreclosure, and was insufficient for that purpose.[2] And when the mortgagee of land, with a mill thereon, makes an entry under his mortgage title upon the premises, and demands of the tenant, holding by parol lease from the mortgagor, to attorn to him, and the tenant assents to such demand; such entry and attornment make the mortgagee an *occupant* of the mill, within the provisions of the Rev. Sts. of Massachusetts, ch. 116, § 24, and liable to an action for annual or gross damages for flowage; although the mortgagee did not enter for the purpose of foreclosure.[3]

[1] Blaney *v.* Bearce, 2 Greenl. 138.
[2] Shepard *v.* Richards, 2 Gray, 424.
[3] Abbott *v.* Upham, 13 Met. 172.

CHAPTER IX.

NATURE OF THE MORTGAGOR'S INTEREST, WHILE LEFT IN POSSESSION.

1. Whether the mortgagor is a *tenant, receiver, agent*, &c.
9. Remedies of the mortgagee for rent, and for obtaining possession. *Notice to quit*, whether necessary.
12. Doctrine in the United States.
18. Lease by the mortgagor; respective titles of mortgagee, mortgagor, and lessee; case of *Keech* v. *Hall*.
35. Distinction between leases made after, and before, the mortgage.
38. Joint lease by mortgagor and mortgagee; covenants in the lease of a mortgagor, whether assignable, &c.
45. General summary.
46. Liability of a mortgagee of leasehold upon the covenants; case of *Eaton* v. *Jacques*.

1. The precise nature of the mortgagor's interest or tenure, while he retains possession, has been the subject of much speculation and various opinions. He has been called *tenant at will*, *quasi tenant at will*, *tenant at sufferance*, *agent*, *servant*, and *receiver* (*a*) of the mortgagee. So the possession of the mortgagor has sometimes been put upon the ground of *license*.[1] But objections have been made to each of these

[1] Rockwell *v.* Bradley, 2 Conn. 1.

(*a*) In Moss *v.* Gallimore, (Doug. 283,) Ashurst, J., remarked, that, where there is no agreement amounting to a re-demise to the mortgagor, and tenants are in possession, and the mortgagor left in receipt of rents; he is not a tenant, because a tenant at will cannot have an under-tenant, but he is in the nature of a receiver. "Whoever wishes to wade through all the old books on this subject," (the nature of the title of the mortgagor) "will find a great collection of cases in Comyns's Digest, title Estate 1, H. But it is an Herculean labor." Per Buller, J., Birch *v.* Wright, 1 T. R. 383. As to the equivocal relation of mortgagor and mortgagee, a learned judge exclaims, "Quo teneam vultus mutantem Protea nodo." Cholmondeley *v.* Clinton, 2 Jac. & W. 183. See McKim *v.* Mason, 3 Md. Ch. 186. A *mortgagee*, taking possession, has been sometimes held subject to the liabilities of a *tenant*. Morrison *v.* McLeod, 2 Ired. Ch. 108.

titles, upon the ground that in some one or more particulars the rights and duties of a mortgagor differ from those of either of the persons above named. Thus he is said to want the chief characteristic of a tenant, which is the payment of rent; of an agent, in not being liable to account; and of a servant, inasmuch as the mortgagee has never had possession.

2. Hence, it has been remarked by a distinguished judge, "it is very difficult to say what the mortgagor's estate is;" [1] (*b*) and, in another case, "one is much at a loss as to the proper terms in which to describe the relation of mortgagor in pos-

[1] Per Patteson, J., Doe *v.* Barton, 11 Ad. & Ell. 311.

(*b*) The following passage, from a work of high authority, presents a summary view of the technical embarrassments connected with the title of the mortgagor: —

"It is the common course, if a man make a feoffment in fee, or other estate upon condition, that if such a thing be or be not done at such a time, that the feoffer, &c., shall reënter, to the end that in this case the feoffer, &c., may have the land, and continue in possession until that time, to make a covenant that he shall hold and take the profits of the land until that time; and this covenant in this case will make a good lease for that time, *if the uncertainty of the time*, whereunto care must be had, do not make it void. (Mr. Preston adds: 'The limitation of a certain term, with a collateral determination on the event, would meet the difficulties of the case.') And, therefore, if A. bargain and sell his land to B., on condition to reënter if he pay him $100, and B. doth covenant with A., that he will not take the profits until default of payment; in this case, howbeit this may be a good covenant, yet it is no good lease, ('for want,' says Mr. Preston, 'of a more formal contract, and also for want of certainty of time.') And if the mortgagee covenant with the mortgagor, that he will not take the profits of the land until the day of payment of the money; in this case, albeit the time be certain, yet this is no good lease, but a covenant only, ('since,' says Mr. Preston, 'the words are negative only, and not affirmative.') It may perhaps be concluded, that, in order to make a re-demise, there must be an *affirmative* covenant, that the mortgagor shall hold for a determinate time, and that when either of those elements is wanting, there is no re-demise." 1 Smith's Leading Cases, 568, n., citing Shep. Touch. 8th ed. 272. See Jennot *v.* Cooly, 1 Lev. 170.

session and mortgagee."[1] So Lord Denman says:[2] — "It is very dangerous to attempt to define the precise relation in which the mortgagor and mortgagee stand to each other in any other terms than those very words; but thus much is established by the cases of Partridge *v.* Bere, and Hitchman *v.* Walton, that the mortgagee may treat the mortgagor as being rightfully in possession, and himself as reversioner; so that, as long as he be not treated as a trespasser, his possession is not hostile to nor inconsistent with the mortgagee's right."

3. The following remarks upon this subject are made by Mr. Coventry:[3] — "A mortgagor differs from a tenant at will in many respects. He is to pay interest, not rent. He is not entitled to notice to quit, nor to emblements; the crop, as well as the land, being held as security for the debt. (*c*)

[1] Ibid. Doe *v.* Williams, 5 Ad. & Ell. 297.
[2] Doe *v.* Barton, 11 Ad. & Ell. 314.
[3] 1 Pow. 157, n. See Tucker *v.* Keeler, 4 Vern. 161; Butler *v.* Paige, 7 Met. 40.

(*c*) Upon this particular point many cases are to be found in the books, some of which may be here properly cited. "A mortgagor resembles a person who has executed a statute or recognizance. Whatever these persons do to give value to the property under pledge, is done for the benefit of the creditor." Doe *v.* Giles, 5 Bing. 427. One is bound in a statute to another, and sows the land. The conusee extends the lands, which are delivered to him in execution. The conusee shall have the corn sown. So in case of a recognizance. Barden's case, 2 Leon. 54. On the other hand it is said, the improvements made by a mortgagor in possession, in contemplation of law he makes *for himself*, and to enhance the general value of the estate, not like a tenant for its temporary enjoyment. Winslow *v.* Merchants', &c. 4 Met. 310. The issue of a mortgaged slave, born after the mortgagee's title has become absolute at law, and during the possession of the mortgagor, is liable for the debt. Such issue is compared by the Court, in this respect, to the growing crop upon land mortgaged. Also to the case of the pledge of a flock of sheep, where the young afterwards born become also subject to the pledge. Evans *v.* Merriken, 8 Gill & J. 99; Hughes *v.* Graves, Litt. 317; Story's Bailm. 200. Mr. Coventry remarks, (1 Pow. 161, n.) "when it is said that, as between mortgagee and mortgagor, the mortgagee is entitled to emblements, the meaning is, that when the mortgagor has personally occupied the premises,

He may have a tenant under him, which a lessee at will cannot; a demise by the latter being in itself a desertion, which

---

and the actual possession is afterwards delivered to the mortgagee by the sheriff or otherwise, the growing crops which are found upon the premises become part of the security, and may be applied by the mortgagee to his own use; but the principle does not apply to the case where the growing crops have been carried off by the mortgagor before the mortgagee obtains possession, and between the time of his demand and recovery of the possession. Let it be supposed that a mortgagee recovers the possession by ejectment, from a mortgagor who had personally occupied the property, after the crops are severed and sold. Such a mortgagee might probably, if he thought it worth his while, bring an action for the mesne profits from the time of the demise laid, but he could not recover from the mortgagor anything more than the same occupation rent which he could have recovered against a tenant of the mortgagor, whose tenancy had commenced subsequently to the mortgage, and without the privity of the mortgagee." In Hodgson *v.* Gascoigne, 5 B. & A. 88, it was held, that, after judgment in ejectment at the suit of the landlord, the value of the growing crops, though sold or seized in execution, might be recovered in an action for mesne profits, if the sale or execution were subsequent to the day of the demise laid in the declaration. (See Toby *v.* Reed, 9 Conn. 225.) Where a mortgagor leases the land, the lessee has no right to crops growing thereon at the time of foreclosure and sale under the mortgage; and, if the mortgagee himself purchase under such sale, he may maintain trespass against the lessee for taking and carrying them away. Lane *v.* King, 8 Wend. 584. So the purchaser of mortgaged premises, sold under a statute foreclosure, is entitled to crops sown by the mortgagor, and growing on the land at the time of sale. Hence, he is not liable in trover to a purchaser of such crop at an execution sale against the mortgagor; such purchaser acquiring only the title of the mortgagor himself, and the crop as well as the land being a security for the mortgage debt. Shepard *v.* Philbrick, 2 Denio, 174. Since a mortgage binds not only the land, but the crops, while growing, and until severed, a person purchasing the premises under a statute foreclosure is entitled to the crops, in preference to one bidding the same off at a sale subsequently made, under a decree in bankruptcy against the mortgagor, by the assignee in bankruptcy. Gillett *v.* Balcom, 6 Barb. 370. So if land mortgaged be sold under a decree of foreclosure, the purchaser will be entitled to the crops growing at the time of the sale, in preference to a person claiming under the mortgagor, and whose claims originated subsequently to the mortgage. Jones *v.* Thomas, 8 Blackf. 428. In May, 1822, a decree of foreclosure was rendered upon a mortgage, and the marshal ordered, unless payment were made in six months,

in law amounts to a determination of the will. He may assign or convey his estate, subject to the mortgage; while a tenant at will has no assignable interest. A mortgagor has in different cases been called tenant at will, tenant by sufferance,[1] receiver, agent, and servant of the mortgagee; and

[1] Brown *v.* Cram, 1 N. H. 171; Cameron *v.* Irwin, 5 Hill, 281; *quasi* Powsely *v.* Blackman, Cro. Jac. 659; tenant at sufferance, 1 Pow. 174, n. E.

---

to sell the property in satisfaction of the debt. The mortgagor was left in possession till June, 1823, when the marshal sold the property, and the mortgagee became the purchaser. In the spring of that year, the mortgagor sowed the land, and the mortgagee after purchasing completes the crop. Before the marshal's sale is reported and confirmed, an execution is levied upon the crop, then gathered, by creditors of the mortgagor; and the mortgagee files a bill for an injunction against a sale under the execution. Held, the bill should be sustained; that the general doctrine of emblements had no application, but the case turned solely upon the contract between the parties, by which the whole property is made subject to sale for payment of the debt, whenever a decree is obtained. The Court remark: — "If the mortgagor goes on and makes preparations for a crop, he does it with a full knowledge that the land with the crop is subject to be sold, if the decree be obtained before he severs it. Nor does he lose anything by this; for the crop on the land enhances the price. If, by this increase, the debt be overpaid, he gets the overplus; if not, still the full value of his labor goes, as he had agreed it should go, to the payment of the debt." Crews *v.* Pendleton, 1 Leigh, 297, 305. In the case of Keech *v.* Hall, it was intimated, but not expressly decided, that the lessee of a mortgagor, evicted by the mortgagee, would be entitled to emblements. But it is said, (Coote, 393, 394; Co. Lit. 55 *b*; Liford's case, 11 Co. 51,) that both upon legal and equitable principles he is not so entitled, being evicted by paramount title; and although the law will not *quoad actionem* make a lessee who comes in by title punishable as a trespasser, yet *quoad proprietatem* the regress of the disseisee revests the property as well for the emblements as for the freehold itself, and equally against the feoffee or lessee of the disseisor, as against the disseisor himself. The rule and reason of the law is, that after the regress of the disseisee, the law adjudges that the freehold has continued in him; which rule and reason extends as well to the emblements as to the freehold; and although the act of the disseisor may alter a man's action, yet his act cannot take away his action, property, or right. See Cassidy *v.* Rhodes, 12 Ohio, 88. Where, before foreclosure of a mortgage, the mortgagor agreed with the defendant that he should crop the land on shares, to which the mortgagee afterwards assented; the foreclosure purchaser cannot maintain replevin for the crops. Congden *v.* Sanford, Hill & Den. 196.

Lord Mansfield's remark in Moss *v.* Gallimore,[1] (*d*) that he is only *like* a tenant at will, and that nothing is more apt to confound than a simile, seems equally applicable to all the other proximate relations above referred to; neither of which in all respects expresses the rights and duties of the mortgagor as occupant of the estate. For example, he is not a receiver, because, as stated by the Lord Chancellor, in Wilson *ex parte*,[2] the mortgagee cannot call him to account for past rents. It has been well said, however, by Judge Buller, in Birch *v.* Wright,[3] that a mortgagor and mortgagee are characters as well known, and their rights, powers, and interests, as well settled, as any in the law. The possession of the mortgagor is the possession of the mortgagee, and as to the inheritance, they have but one title between them."

4. With regard to the points suggested by Judge Buller, Mr. Coote remarks:[4] — "This view of the question does not meet the difficulty, for the rights, powers, and interests of mortgagor and mortgagee, are in many instances grounded on their respective estates in the land; and, therefore, we are still driven back to the original question, what are those estates? The common law recognizes no such *estate* as that of mortgagor or mortgagee, independently of some other known estate or interest in the land; for the *estates* both of the mortgagor and mortgagee are of a compound nature, partaking partly of legal and partly of equitable rights; and it is difficult to perceive in what manner these compound estates can as such be regarded in a court of law, although possession of the mortgagor may confer on him certain priv-

[1] Dougl. 282; Miner *v.* Stevens, 1 Cush. 485.

[2] 2 Ves. & B. 253.

[3] 1 T. R. 383.

[4] Coote, 374.

(*d*) In the same case, Buller, J., says, with reference to a remark upon the same subject in Keech *v.* Hall: — "Expressions used in particular cases are to be understood with relation to the subject-matter then before the Court."

ileges under the statute law and poor laws. In addition to which it may, under circumstances, become essential to ascertain, whether at common law there is any, and what privity of estate between the parties; for if the mortgagor in possession may be considered as tenant at will, or, under the agreement for possession, as tenant for years, to the mortgagee, there will be sufficient privity of estate between them to admit of an enlargement by release alone, which will not be the case if he is to be considered as tenant at sufferance, or an agent, or receiver. So long as the mortgagor is in possession of the land, and the legal ownership is in the mortgagee, there must subsist a tenancy of some sort between the parties; or otherwise the mortgagor must be a trespasser, for the law of England recognizes no possession independent of a tenancy, either to the lord paramount or a mesne lord. The mortgagor in possession must hold of some one, and to say that his possession is that of a mortgagor, is in fact leaving the question undecided."

5. Upon the particular point, whether the mortgagor is a *tenant*, in the case of Doe *v.* Maisey,[1] Lord Tenterden denied that the mortgagor is a tenant, or, if a tenant, anything more than a tenant at sufferance; but held, that he holds by a peculiar tenure, and may be treated as a tenant or trespasser at the election of the mortgagee. The weight of authority, however, seems to justify this application of the word tenant. Thus it is said, he is in possession of premises, whereof the legal title and interest is in another, and by the permission and sufferance of the latter. Therefore a declaration, describing him as *tenant*, will be sustained by producing a mortgage deed. A court of law knows nothing about mortgagor and mortgagee. It looks at the legal tenant. The mortgagor has actual possession, and the mortgagee the legal estate, and at law the tenancy cannot be disputed. More especially is the mortgagor to be regarded as a tenant, so far as is necessary to sustain an action by the mortgagee against

[1] 8 B. & Cress. 767.

a trespasser.[1] So in Partridge *v.* Bere,[2] the declaration alleged, that the premises were in the possession and occupation of Turner, as tenant to the plaintiff, the reversion belonging to him. It appeared that Turner, being tenant for life, mortgaged to the plaintiff for years, if he should live so long, and that Turner had since occupied and paid the interest. It was contended that the relation of landlord and tenant did not exist, and therefore the declaration was not sustained. *Per Curiam:* — "Here the mortgagor was in actual possession of the mortgaged premises, by sufferance of the mortgagee, who has the legal title vested in him. The former, therefore, is a tenant, within the strictest definition of that word." (*e*) So Lord Abinger says:[3] — "If a mortgagor be not tenant to the mortgagee, in what relation does he stand? He is not a trespasser; he is not a servant, because the mortgagee is not in possession; the ordinary terms known to the law are a mortgagee *in* possession and *out of* possession. If there be a stipulation that he shall be allowed to remain in possession for a time, by the very terms of the deed he is a tenant for that time, and is in possession for *a term;* if he continues in possession, and holds over, he continues on the same terms as during that time." So the doctrine of estoppel, applicable to tenancy, is also held to apply to the mortgagor, after the *law day*, as a *quasi* tenant.[4] (*f*) And a conveyance,

[1] Per Sir Thomas Plumer, M. R. Cholmondeley *v.* Clinton, 2 Jac. & W. 183.

[2] 5 B. & A. 604.

[3] Hitchman *v.* Walton, 4 Mees. & W. 413.

[4] Wires *v.* Nelson, 26 Verm. 13.

(*e*) In Doe *v.* Giles, 5 Bing. 426, Best, C. J., remarks upon the above case: "This was not a case between the mortgagee and the mortgagor, in which the courts were called upon to decide what are the rights of the one against the other. The defendant in that case was a wrongdoer, and had, therefore, no right to object to the plaintiff calling himself a reversioner as long as he permitted the mortgagor to be in possession."

(*f*) And, if he executes two or more successive mortgages to different persons, he is as much estopped to deny the title of the subordinate mortgagees, as of the first. His deed estops him from denying the title of either,

with a bond of defeasance, constitutes a mortgage, notwithstanding an agreement that the mortgagor may retain possession and pay a rent equivalent to the interest of the debt.[1]

6. And it is equally common to speak of the mortgagor as a *tenant at will.* Thus in the case of Groton *v.* Boxborough, Parsons, C. J., says : — "As between the mortgagee and mortgagor, and those claiming under them respectively, it must be admitted that the legal freehold passed by the mortgage ; the mortgagor being *a tenant at will* to the mortgagee, who might enter and take possession at his pleasure, without being obliged by law to give the mortgagor notice to quit."[2] So in a later case in the same State, it is said, " a mortgagor, as against the mortgagee, stands as tenant at will."[3] And in Wilder *v.* Houghton,[4] which was an action by a mortgagee to recover from an assignee of the mortgagor the mesne profits received by him since the commencement of a suit to foreclose, Parker, C. J., remarked : — " The defendant stands in the place of the mortgagor, so that the question submitted is the same as if the present action were between the mortgagee and mortgagor ; and in this view it must be considered an experiment, no such action having been hitherto brought, either in this country or in England, as far as we can discover from the books." The mortgagor " is, it is true,

[1] Woodward *v.* Pickett, 8 Gray, 617.
[2] 6 Mass. 52, 53.
[3] Per Shaw, C. J., Van Deusen *v.* Frink, 15 Pick. 457.
[4] 1 Pick. 88, 89. See Morey *v.* McGuire, 4 Verm. 327 ; Lull *v.* Matthews, 19, 322 ; Pierce *v.* Brown, 24, 165.

---

or setting up an outstanding title in a stranger, or of defending himself by means of that title, until he has first *bonâ fide* surrendered the possession. Wires *v.* Nelson, 26 Verm. 13. Where tenants of the mortgagor and the mortgagor himself hold in severalty portions of the mortgaged premises, the mortgagee may recover a joint judgment for the rents and profits of the whole against them all, unless they separate in their defence by a disclaimer. The subordinate mortgagee may recover the rents and profits from the time notice is given to the mortgagor, and, when no notice is given by the prior mortgagee, from the service of his writ or notice. Ibid.

considered as a mere *tenant at will*, and according to our practice, and to the decision of the Court of King's Bench, reported in Douglas, 21, he may be ejected without any notice to quit. Yet he is in many respects the owner of the land, and when left in possession, there must be an implied understanding that he is to occupy and improve in the same manner as before the execution of his mortgage. It is true, that when the estate mortgaged is not full security for the debt, the profits would be useful to the mortgagee, as a means of payment; but to obtain them he should enter early, or bring his writ of entry, which he may do immediately upon the execution of the deed; if he chooses to lie by, and suffer the mortgagor to keep possession, he consents that the intermediate profits may be received by him, and held without account."

7. It has been held, however, in a late case, in Massachusetts, that a mortgagee who has entered for foreclosure cannot maintain the *landlord and tenant process* against the mortgagor. The Court remark:—"Although, in a loose sense, a mortgagor in possession is said to be tenant at will of the mortgagee, yet he is not within the reason or the letter of the Rev. Stats. ch. 104, § 2. He is not a lessee, or holding under a lessee, or holding demised premises without right, after the determination of the lease. The remedies of a mortgagee are altogether of a different character, clearly marked out by law."[1] So, where a mortgagee recovered a conditional judgment, and took possession under an execution, but did not eject the mortgagor, who agreed to quit peaceably whenever the mortgagee should lease the premises; held, a third person, receiving a written lease from the mortgagee, could not, upon the mortgagor's refusal to quit, maintain this process against him.[2]

8. An agreement in the mortgage, that the mortgagor shall be tenant at will, constitutes a strict tenancy at will, though an annual rent be reserved. And the relation of landlord

[1] Hastings *v.* Pratt, 8 Cush. 121–123. [2] Larned *v.* Clark, 8 Cush. 29.

and tenant may be created by a clause to that effect, though the mortgagor alone execute the deed; and the subsequent occupation of the mortgagor will be held to be under the tenancy, though the receipts for half-yearly payments of rent are given in the name of interest.[1] So a mortgage contained a power of sale, and then a proviso and covenant, by the mortgagee, that no sale should take place, nor any means of obtaining possession of the premises be taken, until the expiration of twelve calendar months after written notice of such intention. The mortgagee also covenanted for the mortgagor's quiet enjoyment as his tenant at will, on payment of a yearly rent in lieu of, and as interest upon the mortgage-money. The mortgagee remained in possession, but no livery of seisin was made to the mortgagor. Before suit commenced, there was a demand of possession, but no notice to quit. Held, the deed created a tenancy at will, and the mortgagee or his assignee might maintain ejectment.[2] So the mortgagor agreed to become tenant "henceforth at the will and pleasure of the mortgagee, at the yearly rent of, &c., payable quarterly." Held, a tenancy at will, not converted into a tenancy from year to year by occupation for two years, and payment of rent.[3]

9. The question, as to the precise nature of the relation between a mortgagor in possession and his mortgagee, has generally been raised, either in connection with a claim for rent, or a resort to legal process for the purpose of ejecting the mortgagor from the premises; and more especially with the inquiry, whether, like ordinary tenants at will, he is entitled to *notice to quit*, before bringing ejectment against him.

10. Mr. Coote says, where there is an agreement for the mortgagor's possession till default, and such default occurs, and he remains in possession without any new agreement; or if the mortgage contains no such agreement, he may be treated as a tenant at sufferance or a trespasser, though the

[1] Coote, 377.

[2] Dixie *v.* Davies, 8 Eng. Law & Eq. 510.

[3] Doe *v.* Cox, 17 L. J. 3. See Freeman *v.* Edwards, Exch. 17, L. J. 258; Chapman *v.* Beecham, 3 Q. B. 373.

mortgagee have received interest; and wherever there is no agreement for his occupation till a certain period, his continuance in possession, if with the mortgagee's consent, must be considered as a species of tenancy at will, though without two of its chief incidents; namely, emblements, and the right to a determination of the will before bringing ejectment. It must be admitted, however, to be doubtful, *from the cases*, whether any tenancy exists between the parties; though their relative rights are well ascertained, and the mortgagee may, as against strangers, treat the mortgagor as his tenant.[1] (*g*)

11. It has been held in recent cases, that the mortgagee may evict the mortgagor, though the mortgage provides that the latter shall be tenant at a certain rent; if there is also the usual power of entry on default of payment.[2] Thus in Doe *v.* Tom[3] it was held, that, where the mortgagor becomes tenant to the mortgagee at a rent, with the right of immediate entry upon default; the latter may eject him, upon default, without demand of payment or notice to quit. So, by an indenture of mortgage, the mortgagor released in fee upon certain trusts; and demised other lands for ninety-nine years upon certain trusts; to be void, on payment of a certain sum upon such a day. If not paid, the mortgagee, after a month's notice, might take possession, and, whether in or out of possession, lease and sell the lands; and should hold the rents and profits and the proceeds of sale in trust to pay the debt and interest, and then in trust for the mortgagor. The mortgagee covenanted not to sell or lease till after the expiration of a month's written notice, demanding payment; and that he would at any time before sale

[1] Coote, 377, 378. See Hitchman *v.* Walton, 4 Mees. & W. 414; Ing *v.* Cromwell, 4 Md. 31.

[2] Doe *v.* Tom, 4 Q. B. Rep. 615; —— *v.* Olley, 12 Ad. & Ell. 481.

[3] 4 Q. B. 615.

(*g*) To enable a mortgagee to *distrain* on the mortgagor in possession, the mortgage should contain an agreement to that effect, and state a certain sum by way of rent. Coote, 403.

reconvey and reassign, upon payment of the debt and costs. The mortgagor covenanted to pay principal and interest. The freehold lands to be the fund primarily liable, without prejudice to the right of resorting to the others. The mortgagor remaining in possession, held, ejectment would lie against him for all the lands, without notice, after the expiration of the time mentioned.[1] So, in the case of Doe *v.* Giles,[2] it was provided in a mortgage deed, that, if the debt remained unpaid for a certain time, the mortgagee might enter, and, if not paid within thirty days from the day fixed for payment, he might proceed to a sale of the estate without the concurrence of the mortgagor. Two days after that on which the mortgagee had a right to enter for non-payment, and before payment of any interest, the mortgagee brings ejectment, without any previous demand of possession. Held, the action was maintainable. Best, C. J., says,[3] (after the day fixed for payment,) "the possession belongs to the mortgagee. And there is no more occasion for his requiring that the estate should be delivered up to him before he brings an ejectment, than for a lessor to demand possession on the determination of a term. If this situation exposes mortgagors to any hardship, they must guard against it by an alteration in the terms of the mortgage deeds. Mortgagees, however, do not find it to their advantage to enter upon the estates, if they can get their interest regularly paid; for, from the time that they get possession, their situation is far from desirable, from the constant state of preparation that they must be in to account to the mortgagor, whenever he shall be ready to discharge the mortgage debt."

12. The doctrine upon this subject in the United States has been somewhat various.

13. In the case of Rockwell *v.* Bradley,[4] in Connecticut, it was held, that a mortgagee may maintain ejectment against the mortgagor, without a demand or notice to quit. Three

[1] Doe *v.* Day, 2 Ad. & Ell. (N. S.) 147.
[2] 5 Bing. 421.
[3] 5 Bing. 427, 428.
[4] 2 Conn. 1.

judges out of eight, however, dissented; and some of the others admitted, that if, by the pleadings, the defendant had relied upon *a license* from the plaintiff, such license might well have been inferred from the fact of his being left in possession, and other circumstances of the case. The dissenting judges founded their opinion upon the facts, that the leading cases cited in favor of the action were suits against an assignee or lessee of the mortgagor; that by the *dictum* of Lord Mansfield in Keech *v.* Hall, as to the mortgagor's possessing the premises at will "in the strictest sense," nothing more is meant than a *tenancy at will* in the original sense, as distinguished from a *tenancy from year to year*, requiring six months' notice; and that a *tenant at will* cannot be treated as a disseisor without *some* notice to quit. It was further remarked, that a mortgagor left in possession is a strict tenant at will or at sufferance, by an implied agreement or license, unless the contrary appears; that possession of the mortgagor for fifteen years does not bar the mortgagee's entry under the statute of limitations, and that the mortgagee may transfer or devise his interest during such possession; all showing it not to be adverse.

14. In the subsequent case of Wakeman *v.* Banks,[1] the same decision was made by the Court, with a similar dissent on the part of several judges. It was further distinctly held, that the execution of a mortgage, and the subsequent possession of the mortgagor, are not facts from which it is competent for a jury to infer a license to remain in possession. Swift, C. J., points out the following characteristics of a mortgagor, which do not apply to a tenant at will. He is not liable to an action of waste; he may dispose of the whole or a part of the estate; it descends to his heirs; he is considered the owner, in all respects, except for payment of the debt. The right to bring ejectment, without notice to quit, is compatible with the nature of the estate; for it is only a security for a debt; and it is a well-known principle *that a suit may be brought against a debtor, without notice.*

[1] 2 Conn. 445.

15. In Vermont, the mortgagee may enter after breach of condition.[1] If he suffers the mortgagor to remain in possession, the latter is tenant by sufferance merely, and may be evicted without notice. So, though the mortgagee has given him a lease for years, yet, at the expiration of the term, his former liabilities revive and continue, and he will be held tenant by sufferance merely. And if, after the expiration of the term, he lease by parol to a third person, such third person can stand in no better condition than the mortgagor, as respects the mortgagee.[2]

16. In North Carolina, the mortgagee may maintain ejectment without demand or notice.[3] In New Hampshire, he may treat any one found in possession, whose title is not good against him, as a wrongdoer and disseisor, at his election.[4]

17. In New York it has been held, that the mortgagee cannot maintain ejectment against the mortgagor, without a previous notice to quit. So it has been held in a later case in the same State, that, where a mortgage is made to secure a debt, and the mortgagor left in possession, there is an implied agreement that he shall continue to hold possession. His possession being lawful, he cannot be treated as a trespasser, and sued in ejectment without notice. But it is otherwise with a purchaser from the mortgagor, because the sale itself is an act of disloyalty, and the mortgagor a disseisor. Notice is not requisite, without privity of contract or estate. But such privity exists between an assignee of the mortgage and the mortgagor.[5] The Court remark upon this subject as follows: — "I do not think it necessary to go through the English cases, which are not sufficiently uniform to be of much service, to ascertain whether a mortgagor be

[1] Wilson *v.* Hooper, 13 Verm. 653.
[2] Stedman *v.* Gasset, 18 Vt. 346.
[3] Fuller *v.* Wadsworth, 2 Ired. 263.
[4] Wheeler *v.* Bates, 1 Fost. 460.
[5] Jackson *v.* Hopkins, 18 Johns. 488; Lane *v.* King, 8 Wend. 584; Thunder *v.* Belcher, 3 E. 449. See Welch *v.* Adams, 1 Met. 494; Estes *v.* Cook, 22 Pick. 295; French *v.* Fuller, 23, 304; Emerson *v.* Thompson, 2, 473; Polk *v.* Henderson, 9 Yerg. 318; Beeley *v.* Wallace, 16 S. & R. 245; Knaub *v.* Essick, 2 Watts, 282; Dexter *v.* Phillips, 1 Sumn. 116; Bower *v.* Crane, 1 N. H. 169; Chapman *v.* Armistead, 4 Munf. 382; Jackson *v.* Myers, 11 Wend. 537.

a tenant at sufferance, or at will, or from year to year. It is sufficient for my purpose, that he occupies with the mortgagee's consent, and that by a perfect understanding between them he uses the premises as his own. Most commonly his interest is much greater than that of the mortgagee, and in practice, we know that no tenant at will, for years, or even for life, exercises such unlimited dominion over land, as the mortgagor. It comports then neither with reason nor feeling, to permit him to be put to the expense and vexation of an ejectment, without a previous notice to quit. This is no hardship on the mortgagee, while a contrary practice may be much abused, in a country where so many thousand estates are held in this way. Without any nice disquisition of the rights and duties of particular tenants, (which may perplex, but cannot elucidate the question,) I am ready to say, that no person who holds land by another's consent, for an indefinite period, ought ever to be evicted by ejectment, at the suit of such party, without a previous notice to quit. This should especially be required in all cases of mortgages, because the mortgagor may not only surrender the possession of the land, but may protect himself against an action by payment of the money due. The case of Keech *v.* Hall, in Douglas, 21, is not an authority here; and it is enough to say, that we may be permitted to regulate a mere matter of practice, even in opposition to what may, under other circumstances, be deemed a better course in Westminster Hall. If a notice be requisite, to be reasonable, it should be delivered six calendar months previous to the service of a declaration."[1]

18. The question above considered, as to the mortgagee's right of possession, and the exact nature of his title, has often arisen, in consequence of the mortgagor's making *a lease* of the premises to some third person, or allowing such person to occupy them as his tenant. The general rule upon this subject is, that a mortgagor in possession cannot make

[1] Per Livingston, J., Jackson *v.* Laughhead, 2 Johns. 75. Three other justices concurred. One dissented.

a lease, binding upon the mortgagee. This principle seems to be well established in England, and is *à fortiori* to be considered in force in the United States, where mortgages, as well as other conveyances of the freehold, are uniformly *registered* or *recorded*, and therefore a subsequent lessee is always chargeable with express or implied notice of the mortgagee's title. Without registration, a mortgage would be invalid, as well against a lease, as any other subsequent transfer. (*h*)

19. The leading case upon this subject is that of Keech *v.* Hall,[1] in which Lord Mansfield gave the following opinion: — "This is an ejectment brought for a warehouse in the city, by a mortgagee, against a lessee, under a lease in writing for seven years, made after the date of the mortgage, by the

[1] Dougl. 21; Fitchburg, &c. *v.* Melven, 15 Mass. 270.

(*h*) In a late and important case of the mortgage of a *railroad* to trustees, for the benefit of bondholders, the mortgage provided, that the mortgagors might, till breach of condition, remain in possession; and that they might improve or lease the property; but further, that, in a certain time after breach of condition, the mortgagee might enter, and apply the proceeds of the property to the debt, or sell it at auction. Held, a lease made by the mortgagor, and the power to lease, terminated with a breach of condition, and a subsequent ratification was invalid. Haven *v.* Adams, 4 Allen, 80. The lease of a mortgagor is held to be good as to all but the mortgagee; and he only can avoid it. McCall *v.* Lenox, 9 S. & R. 308; Hutchinson *v.* Dearing, 20 Ala. 798. If the mortgagor lease, with the mortgagee's consent, and the lessee enter, claiming under no other title; he is not a disseisor, but, on payment and acceptance of rent, a tenant at will. So also is the mortgagor, if he reënter after the lease expires. Powsely *v.* Blackman, Cro. Jac. 659. In Bacon *v.* Bowdoin, 22 Pick. 401, it was held, that, if a mortgagor lease for years, the lessee may redeem; more especially since the provision of the Revised Statutes, ch. 107, § 13, that any person lawfully claiming or holding under the mortgagor may redeem. See Barelli *v.* Schymanski, 14 La. An. 47. If the mortgagor, having, after condition broken, taken from the mortgagee a lease for years, convey to a third person during such tenancy, the mortgagee may still consider him, at the end of his term, to be in possession as mortgagor, and not as tenant from year to year, and evict him at any time without notice. Stedman *v.* Gassett, 18 Verm. 346.

mortgagor, who had continued in possession. The lease was at a rack-rent. The mortgagee had no notice of the lease, nor the lessee any notice of the mortgage. The question is, whether, by the agreement understood between mortgagors and mortgagees, which is, that the latter shall receive interest, and the former keep possession, the mortgagee has given an implied authority to the mortgagor to let from year to year, at a rack-rent; or whether he may not treat the defendant as a trespasser, disseisor, and wrongdoer. No case has been cited, where this question has been agitated, much less decided. The only case at all like the present, is one that was tried before me upon the home circuit (Belchier *v.* Collins); but there, the mortgagee was privy to the lease, and afterwards, by a knavish trick, wanted to turn the tenant out. The idea, that the question may be more proper for a court of equity, goes upon a mistake. It emphatically belongs to a court of law, in opposition to a court of equity; for a lessee at a rack-rent is a purchaser for a valuable consideration, and in every case between purchasers for a valuable consideration, a court of equity must follow, not lead, the law. On full consideration, we are all clearly of opinion, that there is no inference of fraud or consent against the mortgagee, to prevent him from considering the lessee as a wrongdoer. If the mortgagee had encouraged the tenant to lay out money, he could not maintain this action; but here the question turns upon the agreement between the mortgagor and mortgagee. When the mortgagor is left in possession, the true inference to be drawn is an agreement that he shall possess the premises at will in the strictest sense, and therefore no notice is ever given him to quit, and he is not even entitled to reap the crop, as other tenants at will are, because all is liable to the debt; on payment of which the mortgagee's title ceases. The mortgagor has no power, express or implied, to let leases, not subject to every circumstance of the mortgage. Whoever wants to be secure, when he takes a lease, should inquire after and examine the title-deeds. It was said at the bar, that if the plaintiff can

recover, he will also be entitled to the mesne profits from the tenant, in an action of trespass, which would be a manifest hardship and injustice, as the tenant would then pay the rent twice. I give no opinion on that point; but there may be a distinction, for the mortgagor may be considered as receiving the rents in order to pay the interest, by an implied authority from the mortgagee, till he determine his will."

20. This case is cited by Lord Ellenborough in Thunder *v.* Belcher,[1] as "decisive against the claim of the tenant to notice to quit." It might be otherwise, if the mortgagee had received rent. In such case, although the lease would be invalid, the occupant would become tenant from year to year. "But a mortgagor is no more than a tenant at sufferance, not entitled to notice to quit; and one tenant at sufferance cannot make another. The defendant never had any possession under the mortgagee from whence any tenancy could be inferred, and therefore was not entitled to any notice. He could not be said to have any possession under the mortgagee, if the mortgagor had no authority to let."

21. In Evans *v.* Elliot,[2] Lord Denman remarked upon this case: — "The well-known case of Keech, lessee of Warne *v.* Hall, 1 Doug. 21, is generally considered as an authority the other way; but Lord Mansfield was not there laying down the law upon the subject, so much as explaining his own view of the manner in which mortgagor and mortgagee commonly regard one another in fact. I must add that some misconception may have arisen on this subject, from the care the courts have employed in correcting an acknowledged error of the same great judge, the error of supposing that the right to recover in ejectment could depend on anything but the legal right of possession. This most frequently follows the legal estate; though Lord Mansfield was disposed in some cases to transfer it to him in whom no more than an equitable title was vested. A strong assertion of the right of the mortgagee in such a case against the mort-

[1] 3 E. 450. [2] 9 Ad. & El. 342.

gagor may have led to the notion that, as against the former, not only the latter, but all claiming under him, must be wrongdoers, without adverting to the possibility of the right of possession being recognized in another by the person enjoying the legal estate."

22. In conformity with the doctrine of Keech *v.* Hall, it is said, "all those who come in under the mortgagor are, strictly speaking, trespassers."[1] So, in another case,[2] "if a person who has an estate, borrows money on it upon mortgage, and becomes the mortgagor of it, and this mortgagor afterwards grants a lease of the property to a tenant, we will suppose for twenty-one years, that lease, being made after the mortgage, cannot be set up by the tenant to prevent the person who has let the money (whom we call mortgagee) from recovering the possession of the property, and the mortgagee may put the tenant out of possession by an ejectment, and the only remedy the tenant has for being thus put out of possession is against the mortgagor." So the tenant at will of a mortgagor, who, on the mortgagee's entry, refuses to pay him rent or quit, is liable to the mortgagee in trespass for the rents subsequently accruing.[3] So it has been held, that, where a mortgagee enters under a judgment, the land being in possession of a tenant under a lease subsequent to the mortgage, there is no privity between them, and the mortgagee may treat the occupant as disseisor or a tenant, at his election.[4]

23. In New York, the rule established in the case of Jackson *v.* Laughhead (p. 193) which requires previous notice to the mortgagor himself, is held in a later case[5] not applicable to a suit brought by the mortgagee against a purchaser from the mortgagor. The Court say, — all privity between the parties is now gone. The purchaser is a stranger to the contract by which the mortgage was created. He cannot be

[1] Per Littledale, J., Pope *v.* Biggs, 9 B. & C. 254.
[2] Per Patteson, J., Doe *v.* Bucknell, 8 Carr. & P. 567.
[3] Hill *v.* Jordan, 30 Maine, 367.
[4] Massachusetts, &c. *v.* Wilson, 10 Met. 127.
[5] Jackson *v.* Fuller. 4 Johns. 215. See Jackson *v.* Stackhouse, 1 Cow. 126.

considered in the light of a tenant. He knows nothing of the original debt, and is under no personal obligation to pay it. He holds possession of the pledge, but not, as in the other case, "by a perfect understanding between him and the mortgagee." He claims exclusively by a title from the mortgagor. "If notice be required in this case, it must be so in every case of ejectment upon mortgage, even though the land has been conveyed in fee from hand to hand, until all knowledge of any existing incumbrance is totally lost."

24. But a still more recent decision holds, that ejectment does not lie in favor of a mortgagee against a purchaser from the mortgagor, without notice to quit, where the demise is laid in the declaration prior to any default of payment. Although the defendant, having taken an absolute conveyance, not acknowledging the mortgage, is not entitled to notice, the sale itself being an act of disloyalty; the right of entry of the mortgagee did not accrue till a default in payment and a termination of the tenancy, neither of which had happened at the time of the demise as laid in the declaration.

25. Where one in possession under the mortgagor refuses possession to the mortgagee upon his entry for breach of condition; the latter may maintain an action against him for mesne profits, though the entry be insufficient for foreclosure.[1] Wilde, J., says,[2] — the plaintiffs might elect to consider the defendants as trespassers, after their refusal to quit, as they might consider them as disseizors, and in a writ of entry evict them. And if the defendants refuse to quit, and their continued occupation against the will of the plaintiffs would amount to an actual disseisin; still the plaintiffs by their subsequent entry became lawfully reseized, and had a right to maintain trespass for the mesne profits, without resorting to a writ of entry. So, where the mortgagee himself purchases under a sale for foreclosure, after the decree, he may treat an occupant under the mortgagor as a tenant or trespasser; and is entitled to the rents, from a demand of possession, or the making of a conveyance.[3]

[1] Northampton &c. *v.* Ames, 8 Met. 1.
[2] Ibid. 7.
[3] Castleman *v.* Belt, 2 B. Monr. 158.

26. Upon the question, how far the mortgagee may be debarred by his own conduct in reference to a lessee of the mortgagor, from treating him as a trespasser or occupant without right, there is no little confusion in the cases. The general principle is, that, although a lease made by the mortgagor is invalid against the mortgagee, if he chooses so to consider it; yet he may, at his election, ratify such lease, and adopt the lessee as his tenant; thereby substituting a liability on the part of the lessee to himself for rent, in place of the former one to the mortgagor.

27. It is perfectly well settled, that the mortgage, of itself, and independent of some specific action of the mortgagee, directed to that end, will not authorize him to claim the rents and profits. Thus it is held, that, where the mortgagee has not taken a specific pledge of the rents and profits, he has no equitable claim to them, as against the assignee of a chattel mortgage from the tenant to the mortgagor, to secure the rent. If the mortgagee obtains an order upon the tenant, to attorn to a receiver appointed in a foreclosure suit, he can claim only immediate possession of the premises, as security. If the tenant has gone into possession *pendente lite*, the order may be, that he yield possession or pay rent from that time to a receiver. But he has no right, in any event, to an order, especially as against the equitable rights of others, which will in effect vest him with the possession *nunc pro tunc*, as of a time anterior to the application.[1]

28. But although, if the mortgagee does not choose to enter and receive the rents, the tenant may pay rent to the mortgagor; it seems to be the prevailing rule, that, after notice by the mortgagee of his title, and a claim of rent, the rent must be paid to him.[2] Thus it has been held, that, where a mortgage is duly recorded, a tenant cannot lawfully pay a year's rent in advance to the mortgagor; and, if he does so, upon a bill for foreclosure by the mortgagee, the Court may

[1] Zeiter *v.* Bowman, 6 Barb. 133; Weidner *v.* Foster, 2 Penn. 23; Myers *v.* White, 1 Rawle, 355.

[2] 2 Greenl. Cruise, 107, n.; acc. Smith *v.* Taylor, 9 Ala. 633; Babcock *v.* Kennedy, 1 Verm. 457.

compel him to pay it again to a receiver.[1] And, after notice, the mortgagee has been held entitled to claim the rents and profits due at the time of such notice, as well as those which accrue subsequently.[2] So where the assignees of a bankrupt mortgagor brought an action for use and occupation against his lessee, under a lease made after the mortgage; it was held, that the defendant might show in defence a payment made to the mortgagee after notice and demand.[3] So to an avowry for rent, the tenant may plead payment of it to a mortgagee, under a mortgage prior to the lease, who had demanded payment from the tenant, and threatened to put "the law in force" in case of refusal. Such plea is in substance a plea of payment, not a *nil habuit*, or *eviction*. The defect of the lessor's title is shown, only as a medium of proof, that the payment was for his benefit, and by reason of his default. The plea, far from denying the mortgagor's title to grant the lease, recognizes his title throughout, and admits the money to have been rent due and in arrear to him, and proceeds to show how it has been satisfied.[4] So, where a mortgagor leased the land by parol, and a second mortgagee entered, and notified the tenant that he should thenceforth claim rent of him, to which the tenant did not object; and the mortgagee subsequently recovered the land from the tenant by a writ of entry: held, the mortgagee might maintain assumpsit for the rent, from his entry to the time of suing out the writ of entry, by which act he elected to consider the defendant as a disseizor; and that the prior mortgage was no bar to the suit, the prior mortgagee having never entered or claimed rent.[5] So, where a mortgagor makes a lease, if after forfeiture the tenant promises to pay and pays rent to the mortgagee, he becomes the mortgagee's tenant, and the mortgagor can maintain no action for the rent.[6] So one Morton,

[1] Henshaw *v.* Wells, 9 Humph. 568.
[2] Hutchinson *v.* Dearing, 20 Ala. 798; Coker *v.* Pearsall, 6 Ala. 542.
[3] Pope *v.* Biggs, 9 B. & C. 245; Doe *v.* Simpson, 3 Kerr, 194; acc. Stedman *v.* Gasset, 18 Verm. 346.
[4] Johnson *v.* Jones. 9 Ad. & Ell. 809.
[5] Cavis *v.* McClary, 5 N. H. 529.
[6] Kimball *v.* Lockwood, 6 R. I. 138.

being an owner in fee, mortgaged to Marriott, but remained in possession, and afterwards demised part for a term to Barton, who also entered; after which Morton mortgaged to Higginbotham; who subsequently received rent from Barton, and demised the other part to Bullock. Afterwards Barton and Bullock, upon notice from Marriott, paid rent to him. Higginbotham then brings ejectment, after notice to quit, against Barton and Bullock. Held, the defendants might both set up in defence the first mortgage to Marriott, his notice to them, and their payment of rent to him; and that Morton's being only a mortgagor in possession, at the time of the demise to Bullock, did not affect Morton's right to confer upon him by demise a legal title to possession, but Bullock might show, that Morton had since been treated as a trespasser by the mortgagee, so as to determine the right of Morton; and that the mortgagee's notice to the tenant to pay him the rent might, if received in evidence, tend to show, that the mortgagee treated the mortgagor as a trespasser.[1] Lord Denman says,[2] the mortgagee "was entitled to the profits of the land, and the defendants were right in paying him those profits, whether strictly called rent or not. He might have ejected them, and afterwards let to them; and it seems absurd to require him to go through the form of an ejectment, in order to put them into the very position in which they now stand." And further: — "It is conceded on all hands, that where a lease is made by the mortgagor subsequently to the mortgage, and the mortgagee afterwards requires the rent to be paid to him, and it is paid accordingly, the relation of landlord and tenant may arise between the parties. Or, at all events, the mortgagee may be entitled to sue the tenant for use and occupation." To the same effect it is said by Mr. Justice Bayley,[3] in case of a lease made after the mortgage, "the tenant may consider the mortgagor his landlord so long as the mortgagee allows the mortgagor to continue in possession and receive the rents; and payment

[1] Doe *v.* Warburton, 11 Ad. & Ell. 307.

[2] Ib. pp. 315, 316.

[3] Pope *v.* Biggs, 9 B. & C. 251.

of the rents by the tenant to the mortgagor, without any notice of the mortgage, is a valid payment. But the mortgagee, by giving notice of the mortgage to the tenant, may thereby make him his tenant, and entitle himself to receive the rents. It is undoubtedly a well-established rule, that a lessee cannot dispute the title of his lessor at the time of the lease, but he is at full liberty to show that the lessor's title has been put an end to. There is another rule of law, namely, that the mortgagor cannot dispute the title of the mortgagee." So the holder of a mortgage upon leased premises made open and peaceable entry for the purpose of foreclosing and receiving the rents and profits. The defendant, the tenant, consented to the entry, but the plaintiff, an assignee of the mortgagor, was not present. The holder of the mortgage required the defendant to pay him rent from the time of entry, and he agreed to do so, and actually paid it, taking a bond of indemnity. The plaintiff required the defendant to pay him, forbade him to pay the holder of the mortgage, and also notified the latter, that he would not consent to his having possession and taking the rent. Held, the action, being for use and occupation after such entry, would not lie.[1] So, in case of a mortgage and subsequent lease by indenture, for five years, reserving rent, and an assignment of the lease; between five and six months after the lease, the mortgagee entered to foreclose, and the lessee attorned to him, and afterwards accounted with him for the first year's rent. The assignee brought an action against the tenant, on a *quantum meruit* count, for a portion of the first year's rent. Held, the action could not be maintained.[2] So a notice from a mortgagee to an agent of the mortgagor, employed to collect rents from tenants of the estate, to pay the rents, when collected, only to himself, is a termination of the mortgagor's tenancy at will, and makes the agent a trustee for the mortgagee, as to all rents subsequently accruing.[3]

29. But on the other hand it has been held, that the ten-

[1] Welch *v.* Adams, 1 Met. 494.
[2] Knowles *v.* Maynard, 13 Met. 352.
[3] Crosby *v.* Harlow, 8 Shepl. 499.

ancy under the mortgagor is not affected by an authority from the mortgagor to the mortgagee to receive the rents, though perhaps such authority may be irrevocable, and justify all payments made under it while the debt continues.[1] So, where a mortgagor made a lease, and, rent being due, the mortgagee gave notice of the mortgage to the tenant, and claimed the rent; held, in an action for use and occupation by the mortgagor, such claim and notice, without payment, furnished no defence to the suit.[2] And it is said in a recent case,[3] "whether mere notice to tenants by a mortgagee to pay rent to him, or any other act short of an actual or constructive entry, will defeat the right of the mortgagor to take the rents and profits to his own use, may be a question." So a mortgagor may recover the rents from one who has wrongfully received them, the mortgagee having made no claim to them, although the law day be past.[4] So it is held in New York, that, although where a mortgage is made by one who has previously leased the land the mortgagee may distrain for rent; yet, where a lease is made by the mortgagor after the mortgage, the mortgagee can neither distrain nor sue for rent, there being no privity of contract or estate between him and the tenant. Spencer, Ch. J., remarks,[5] there is no adjudged case which countenances the contrary doctrine. The mere legal ownership of the land cannot authorize either an action or a distress for the rent. The mortgagor holds, it is true, upon an implied consent and agreement, existing between him and the mortgagee; and is therefore entitled to notice to quit, before he can be proceeded against as a trespasser; but it would be going too far to say that he might make leases, which the mortgagee might or might not affirm, at his election. The relation between them does not imply a right on the part of the mortgagor to lease. So, in New Jersey, a mortgagor in possession having con-

[1] Wheeler *v.* Branscomb, 5 Q. B. 373.

[2] Milton *v.* Dunn, 7 Eng. Law & Eq. 406.

[3] Per Shaw, C. J., Field *v.* Swan, 10 Met. 114. See Smith *v.* Shepard, 15 Pick. 147.

[4] Branch, &c. *v.* Fry, 23 Ala. 770.

[5] McKircher *v.* Hawley, 16 Johns. 292; Watts *v.* Coffin, 11 Johns. 495.

veyed the land, the grantee admitted a third person as his tenant. Afterwards, the grantee's interest was sold on execution. Immediately upon the sale and before any deed was given, the tenant attorned to the execution purchaser, and agreed to occupy at a certain rent. The mortgagee afterwards notified the tenant to pay rent to him, and the tenant, receiving an indemnity, did so. The execution purchaser then brings this action against the tenant for the rent. Held, the facts above stated furnished no defence to the suit. Where the mortgage is subsequent to the lease, the rent passes as incident to the reversion which is mortgaged, and the mortgagor is estopped by his own deed to claim it afterwards. But, in this case, the mortgage being made first, the defendant was never tenant to the mortgagee, nor even to the mortgagor. The Court further remarked, that by a statutory provision of the State a tenant shall not attorn to *a stranger*. Therefore the tenant could lawfully attorn only to the grantee or a purchaser from him, and the execution purchaser stood in the same position as one taking a direct conveyance; while the mortgagee was to be regarded as *a stranger*. And although mortgagees are excepted from the general statutory provision against attornment, the effect of this exception is merely to render attornment to a mortgagee valid or invalid, according to the circumstances of each case, but not to authorize attornment to any one but the landlord's grantee.[1]

30. With regard to the precise nature of the relation between the mortgagee and tenant of the mortgagor, growing out of any implied or express recognition of such tenancy by the mortgagee; it is held, that after demand of, or distress for, rent in arrear, *eo nomine*, by the mortgagee, the mortgagor's tenant cannot be treated as a trespasser.[2] So Lord Denman maintained,[3] that by his own acts the mortgagee might be estopped from treating a lessee of the mortgagor

[1] Souders *v.* Vansickle, 3 Halst. 314.

[2] Doe *v.* Hales, 7 Bing. 322. See Doe *v.* Lewis, 13 M. & W. 241; ——— *v.* Kensington, 8 Q. B. 429; Jacob *v.* Milford, 1 Jac. & W. 629; Vallance *v.* Savage, 7 Bing. 595; Megginson *v.* Harper, 4 Tyrwh. 100; Rogers *v.* Humphreys, 4 Ad. & El. 313; Carvis *v.* McClary, 5 N. H. 530.

[3] Evans *v.* Elliot, 9 Ad. & Ell. 342.

as a trespasser; and suggested, that a jury might infer recognition of the lessee's title by the mortgagee, from his knowingly allowing the mortgagor to remain the apparent owner, and deal with the property as his own. His language is as follows.[1] It has been argued, "that the mortgagee may always treat the mortgagor and all who claim under him as trespassers; and that, for that reason, the mortgagor's lessee cannot become the tenant of the mortgagee. My learned brothers are, I believe, disposed to assent to this proposition, which, generally speaking, is certainly not to be questioned. But, for my own part, I wish to guard myself against being understood to adopt it as universal. The contrary must, I think, be admitted, — that a mortgagee may so bind himself by his own conduct as to be precluded from treating the mortgagor's lessee as a trespasser; what conduct might amount to a recognition, seems to me to be rather matter of evidence than of law. I am by no means prepared to admit, that a jury would not be warranted in inferring a recognition of the tenant's right to hold, from the mere circumstance of the mortgagee's knowingly permitting the mortgagor to continue the apparent owner of the premises, as before the mortgage, and to lease them out, exactly as if his property in them continued." So, where a mortgagor leased for years, and an assignee of the mortgage (having notice of such lease) gave notice to the tenant of the mortgage, and required him to pay to the assignee all rent due and to become due for the premises; held, from these facts a jury might infer a contract of tenancy for a year between the assignee and the tenant.[2]

31. But it is held, that if a mortgagee, in case of a lease for years by the mortgagor, instead of turning the tenant out of possession, consents to take him as his tenant, the mortgagee will not thereby set up the lease, but will make the tenant his tenant from year to year only.[3] And in a late

[1] 9 Ad. & Ell. 354, 355.
[2] Brown *v.* Story, 1 Scott, (New) 9.
[3] Doe *v.* Bucknell, 8 Carr. & P. 566.

case [1] it was said: — "I never could see how notice could make the mortgagor's tenant tenant to the mortgagee at the former rent. There might indeed be a new tenancy created at the old rent, where such notice was given, and the rent paid accordingly." Littledale, J., says, "if the lease was made subsequently to the mortgage, I see no remedy the mortgagee could have against the tenant, on non-payment of the rent, but to bring ejectment." So it is held, that to an ejectment upon a mortgage against a tenant of the mortgagor it is no defence, that the plaintiff had received interest thereupon, to a time subsequent to the demise laid in the declaration; such receipt not amounting to a recognition that the mortgagor or his tenant was up to that time in lawful possession.[2] Lord Tenterden, C. J., distinguishes this case from Doe *v.* Hales, (7 Bing. 322,) where the defendant proved, that subsequently to the day laid in the declaration he was in possession, as a tenant of the mortgagor, and the plaintiff called on him, demanded interest on the mortgage, and received it *eo nomine* as interest, requiring the defendant to pay it instead of rent to the mortgagor. Littledale, J., questions the correctness of that decision. Parke, J., says, "Doe *v.* Hales only shows, that where the mortgagee recognizes a party as being in lawful possession of the premises at a given time, it is not competent to him to say afterwards that at that time he was a trespasser. Here the lessor of the plaintiff never recognized the defendant as being in lawful possession." [3] So it is held, that, notwithstanding a distress for rent by the mortgagee, he may treat the mortgagor as a trespasser, upon a subsequent default.[4] And that the reservation of a power of distress, in case the *interest* should be in arrear, in like manner as for rent reserved on the lease, or even a distress under such power, is not of itself sufficient to create a tenancy, or prevent an ejectment without notice, but

[1] Partington *v.* Woodcock, 6 Ad. & Ell. 695, 696. Per Patteson, J.

[2] Doe *v.* Cadwallader, 2 B. & Ad. 473; —— *v.* Goodier, 16 L. J. Q. B. 436, N. S.

[3] Doe *v.* Cadwallader, 2 B. & Ad. 476, 477.

[4] Doe *v.* Olley, 12 Ad. & Ell. 481.

is a mere collateral power, and the demise in ejectment may still be laid on a day prior to the distress.[1] So in a case[2] already referred to it was held, that, by notifying the lessee of the mortgage, and that principal and interest are due, and requiring payment of rent, the mortgagee does not make the lessee his tenant, nor gain the right of distraining for subsequent rent under the lease, although the tenant actually pay him rent at times and in sums corresponding to those in the lease, and by letter recognize him as his landlord. But, in a late case, the defendants, a railway company, laid their rails upon certain lands mortgaged to the plaintiff, and, being called upon by him for compensation, negotiated with him on the subject. The plaintiff had never been in possession, but gave notice of the mortgage to the defendants, and then brought an action for use and occupation. Held, "there was evidence for the jury of the defendants' having held the land on the terms of paying for it, and that the plaintiff, being a mortgagee out of possession, and never having entered previously to the trespass, nor having a judgment by default or a verdict in ejectment, could not maintain an action of trespass against the defendants."[3]

32. Similar questions arise from the actual *foreclosure* of a mortgage. Upon this point it has been held, that, where a mortgagor leases the mortgaged premises, a foreclosure and sale extinguish the lessee's title. And though he be not evicted, if he attorn to the purchaser, the right of the lessor to the future rents is extinguished. So, if the tenant, on being requested to attorn, yield up possession, this is equivalent to an eviction, and will be a good defence to an action by the lessor for subsequent rent. And though the lessor assign the lease to the purchaser, and consent that the rent be paid him for the rest of the term, the tenant may still quit, and refuse to pay the subsequent rents.[4] And the following

[1] Doe *v.* Goodier, 16 L. J. Q. B. 435, N. S.

[2] Evans *v.* Elliot, 9 Ad. & Ell. 342.

[3] Turner *v.* Camerons, &c., 2 Eng. Law & Eq. 342.

[4] Simers *v.* Saltus, 3 Denio, 214. See Jones *v.* Clarke, 20 Johns. 121; Magill *v.* Hinsdale, 6 Conn. 469.

important distinctions have been made in Kentucky. A mortgagee of a reversion may sue the tenant of the mortgagor for use and occupation, unless he has paid his rent before notice of the mortgage. But where a mortgagor in possession makes a lease, and the lessee is suffered to remain in possession, the mortgagee cannot maintain an action for rent. And the purchaser of an equity of redemption does not acquire, as incident thereto, any legal right to rent reserved by the vendor, and accruing after the purchase; the doctrine that rent goes with the reversion being a technical one, and applicable only to the legal title. But a mortgagee, purchasing under a decree of foreclosure, may, after the date of the decree, treat one in possession under the mortgagor as tenant or trespasser, and, from the time of demanding possession or obtaining conveyance, is entitled to the accruing rents.[1]

33. The effect, also, of a *judgment and execution* under the mortgage have been brought in question. Thus the plaintiffs, having a mortgage of a farm occupied by the defendant under a lease from Robinson, subsequent to the mortgage, recovered judgment on the mortgage, and on the first day of January, 1843, took possession under an execution thereupon. The defendant remained in possession, without any new contract, and on the 30th of March, 1843, the plaintiffs first demanded rent. The plaintiffs bring *assumpsit* to recover the rent from October 1, 1842, to April 1, 1843, the defendant having, after the 1st of April, paid it to the order of Robinson, drawn January 21, 1843. It did not appear at what periods the rent was payable. Held, the plaintiffs should recover the rent that accrued after, but not what accrued before, their entry.[2]

34. Upon the subject above considered, Mr. Coote remarks as follows: — "A purchaser of the equity of redemption from the mortgagor, or a lessee who defends for the mortgagor's

[1] Castleman *v.* Belt, 2 B. Monr. 157.

[2] Massachusetts, &c. *v.* Wilson, 10 Met. 126.

benefit, cannot set up a legal title in a third person, paramount to that of the mortgagor, or a prior legal mortgage from the mortgagor to a third person, in order to defend his own possession. But the rule does not apply, when a subsequent purchaser or mortgagee, for valuable consideration, without notice of the prior mortgage, obtains a valid legal conveyance from the mortgagor, who has, in the mean time, become clothed with the legal estate, or gets in an outstanding legal estate; though it would seem that such party might be bound by estoppel, if the mortgage contained a positive recital of the mortgagor's seisin. Of course, a lessee, claiming under the mortgagor subsequently to the mortgage, may show an eviction by paramount title in defence to an ejectment by the mortgagee; or if the lease be prior to the mortgage, it would seem that he may either make this defence, or, without proving eviction, show that, by reason of the paramount title, nothing passed by the mortgage; and notice from the legal owner to the tenant to pay the rent to him is, it seems, evidence of eviction."[1] And the same writer further remarks:[2] — "A new tenancy may be created between the mortgagee and the tenant by payment and acceptance of rent, as rent, or even by the acquiescence of the tenant in the notice to pay the mortgagee; which will, it seems, be a tenancy from year to year upon the terms of the lease; although mere notice by the mortgagee, to pay the rents to him without attornment or assent on the part of the tenant, is insufficient to create a new tenancy. It seems, such notice may be treated as an eviction." (*i*)

[1] Coote, 396; Doe *v.* Clifton, 4 Ad. & Ell. 813; Doe *v.* Stone, 3 C. B. Rep. 176; Right *v.* Bucknell, 2 B. & Ad. 278; Goodtitle *v.* Morgan, 1 T. R. 755; Doe *v.* Barton, 11 Ad. & Ell. 307; but see Gouldsworth *v.* Knights, 11 Mees. & W. 337.

[2] Coote, 402.

(*i*) By indenture of the 23d September, 1856, B. mortgaged to V. as security for a loan, with a power of sale or entry in default of payment of prin-

35. The cases above referred to relate to tenancies created by the mortgagor *after* the mortgage. Different considerations apply, and different rules have been adopted, where the owner of land, which has been already leased, gives a mortgage of it. If a lease is made before the mortgage, the mortgagee is assignee of the reversion, and, in that character, entitled to all the rents payable by the lease; except those paid by the lessee before notice of the assignment. But when the lease is subsequent to the mortgage, the mortgagee is not bound by it. There is no privity between him and the lessee; and, as he could not recover rent of the mortgagor, it has been doubted whether he could recover it of the lessee, who stands in the mortgagor's place.[1]

[1] Fitchburg, &c. *v.* Melven, 15 Mass. 269, 270. See the remarks of Pratt, J., in Syracuse, &c. *v.* Tillman, 31 Barb. 207.

---

cipal and interest on a certain day. The deed also contained the following provision: — "Lastly to the intent that the said V. may have for the recovery of the interest accruing on the principal money hereby secured, the same powers of entry and distress as are by law given to landlords for the recovery of rent in arrear, the said B. doth hereby attorn and become tenant from year to year to the said V., of the said premises hereby assigned, at and under the yearly rent of £125, to be paid by half-yearly payments on the 23d March and 25th September. Nevertheless it is hereby agreed that in the event of any sale under the powers hereinbefore contained, the attornment and tenancy so created shall, as regards such portion of the premises as shall be sold, be at an end; and that without any previous notice to put an end to the same." By indenture of the 18th February, 1857, B. assigned, by way of mortgage, all his interest in the mortgaged premises to the plaintiffs, as security for a loan. By indenture of the 27th October, 1858, V. assigned his mortgage to the plaintiffs. On the 12th November, 1858, the plaintiffs gave B. notice that they had entered under the deed of the 23d September. B. refused to give up possession, and on the 25th November the plaintiffs distrained B.'s goods for rent alleged to be due up to the 25th September. Held, the above clause did not create a tenancy from year to year with all its incidents; and that the plaintiffs might maintain ejectment against B. without giving him six months' notice to quit. Metropolitan, &c. *v.* Brown, 4 Hurl. & Nor. 428.

36. As we have said, a mortgage of leased property is of course a mortgage merely of *the reversion*, and, in general, rent is incident to, and passes with, the reversion.[1] But at what time, and whether by the mortgage itself, or by some act done under it, the mortgagee becomes entitled to the rents, and whether rents in arrear differ from others in this respect, are points upon which the authorities seem not fully agreed. Mr. Greenleaf says,[2] rent in arrear *at the time of a mortgage made* by the lessor does not pass to the mortgagee. So it is held, that, when an estate previously leased is mortgaged, the rents and profits pass as incident to the reversion; and if, *at the time possession is taken*, there is rent accruing upon a quarter not expired, the rent passes as incident, and the mortgagee may sue for it. But the rent which has accrued prior to the entry does not thus pass, being a mere chose in action.[3] Mr. Coote says,[4] if the lease is prior to the mortgage, or made under a power in the mortgage, *the notice of the mortgagee to the tenant* operates as an attornment, relating back to the time of the grant; and all rents due at the time of such notice belong to the mortgagee, who may distrain for them, or, if the tenant holds from year to year or under an agreement, may recover them in an action for use and occupation; even though the mortgagor has, after the mortgage, altered the property and raised the rent. But a mortgagee taking possession, or a receiver appointed on his behalf, is not entitled to the crops previously severed and consigned by the mortgagor, though not actually received by the consignee. So, in the case of Pope *v.* Biggs,[5] Littledale, J., says: — "The mortgagee cannot indeed distrain or maintain any action for the by-gone rents which accrued due before he gave notice to the tenants, because before that time there was no privity between him and the tenants. But the notice by force of

[1] See Mansony *v.* U. S., &c., 4 Ala. N. S. 746, 748; Rawson *v.* Eicke, 7 Ad. & Ell. 451.

[2] 2 Greenl. Cruise, 180.

[3] Massachusetts, &c. *v.* Wilson, 10 Met. 127.

[4] Coote, 402.

[5] 9 B. & C. 254, 255.

Stat. 4 Anne, ch. 16, operates as an attornment of the tenants, and when they attorn they become tenants to the mortgagee, and, at common law, that attornment would have related back to the grant, so as to entitle the mortgagee to all the rents from the time when the deed was executed. A new tenancy is then created; as between mortgagor and mortgagee, the latter becomes entitled to all the by-gone rents. All those who come in under the mortgagor are strictly speaking trespassers. In ejectment, the plaintiff might declare on the demise of the mortgagee, and the accruing rents, being in the nature of mesne profits, might be recovered by the mortgagee from the day when he gave notice of the mortgage to the tenants. And if the mortgagee might, after bringing an ejectment, recover those rents in an action for mesne profits, it is perfectly clear that he is entitled, at law, to receive them without bringing any ejectment. As to the accruing rents, there has been that which is equivalent to an eviction by title paramount before those rents became due, and that will be an answer to any action for rent by the mortgagor." And in Moss *v.* Gallimore,[1] (said to be the leading case upon this subject,[2]) certain leased premises were conveyed by mortgage. The lessee remained in possession some years, paying rent to the mortgagor, when the mortgagor became bankrupt, owing upon the mortgage more than the sum then due as rent. The assignee demanded the rent, and then the mortgagee; and the latter distrained for it. Held, the distress was valid. Lord Mansfield remarks upon the danger of the lessee's colluding with the mortgagor, in such case, against the mortgagee, who has no right to eject the former, he having the prior title: "Of late years, the courts have gone so far as to permit the mortgagee to proceed by ejectment, if he has given notice to the tenant that he does not intend to disturb his possession, but only requires the rent to be paid to him, and not the mortgagor. This,

[1] Dougl. 279. [2] 1 Smith's Lead. C. 314, n.

however, is entangled with difficulties." Attornment is unnecessary, no rent having been paid before notice. "But, having notice from the assignees and also from the mortgagee, he dares to prefer the former, or keeps both parties at arm's length. The mortgagor receives the rent by a tacit agreement with the mortgagee, but the mortgagee may put an end to this agreement when he pleases." Ashurst, J., says: — "Where the mortgagor is himself the occupier, he may be considered as tenant at will; but he cannot be so considered if there is an under-tenant; for there can be no such thing as an under-tenant to a tenant at will. The mortgagor is only a receiver of rent for the mortgagee; who may, at any time, countermand the implied authority."

37. The execution purchaser of an equity of redemption has been held entitled to the same privileges, in regard to tenancy and rent, previous to any actual or constructive dispossession by the mortgagee, as the mortgagor or his lessee. Thus a mortgagor leased for a certain term, and verbally agreed with the mortgagee, that the mortgagor should have possession and control, and receive the rent of the estate. The mortgagee afterwards brought an action for foreclosure against the mortgagor, recovered judgment, and took out an execution, but the latter was never delivered to an officer, the tenant still remaining in possession under the lease. The plaintiff, a creditor of the mortgagor, levies an execution upon the equity of redemption, himself purchases it, and verbally lets the estate to the defendant, who enters at the expiration of the former lease, and occupies till dispossessed by an execution, in favor of the mortgagee against the plaintiff, in a writ of entry. The plaintiff brings an action to recover rent of the defendant, from the time he took possession, till dispossessed by the mortgagee.[1] Shaw, C. J., remarked,[2] that the plaintiff, having purchased the equity, stood in place of the mortgagor, with the right of taking the rents and

[1] Field *v.* Swan, 10 Met. 112.

[2] Ibid. pp. 114, 115.

profits to his own use, till the entry or some equivalent act of the mortgagee; which did not exist in this case, but, on the contrary, were expressly waived by the action of the mortgagee, brought for the purpose of foreclosing, and averring him to be dissesised and out of possession.

38. From the preceding remarks, relative to the legal rights and obligations connected with the leasing of a mortgaged estate, it may be inferred that great caution is desirable, in the mode of creating a tenancy, in order to avoid any conflict as to the title or the payment of rent. Mr. Coventry says,[1] "both the mortgagor and mortgagee should join in the demise. The mortgagee should 'demise, lease, and to farm let,' and the mortgagor 'grant, demise, lease, ratify, and confirm;' and the rent should be reserved to the mortgagee so long as the premises shall remain in mortgage; and to the mortgagor for the residue (if any) of the term. The whole legal estate is in the mortgagee, he therefore should be the leasing party. The simple assent of the mortgagee to the mortgagor's granting leases would be wholly inoperative for the purpose of transferring an interest to the lessee. Nor will a lease, even made by a mortgagee (without the mortgagor) and before foreclosure, although he be in possession under the mortgage, be good in equity against the mortgagor, unless it be of necessity and to avoid an apparent loss." So Professor Greenleaf says, that "to the creation of a valid lease of an estate in mortgage, the concurrence of the mortgagee and mortgagor is essential. The mortgagee, having the legal estate, should demise, and the mortgagor also should demise and confirm. The rent may be reserved generally, and the covenants from the lessee should be made with the mortgagee, and also with the mortgagor, severally. Sometimes a power is reserved in the mortgage for the mortgagor to appoint by way of demise, in which case the lease takes effect as an appointment of the use to the lessee for the term:

[1] 1 Pow. 177, n. See Barney *v.* Adams, 2 Tyrwh. 289; Doe *v.* Goldsmith, Ibid. 710.

in this instance, the reservation may be general, and the covenants should be entered into with the mortgagee and also with the mortgagor severally, as where the lease operates as a common law demise. If the mortgage is of leaseholds, of course the mortgagor cannot, under a power to lease in the mortgage deed, make an under-lease of the legal estate without the concurrence of the mortgagee."[1]

39. Where mortgagor and mortgagee join in a lease, containing an express covenant by the former for quiet enjoyment, no covenant from both can be implied.[2] So, in a lease from mortgagor and mortgagee, reciting the mortgage, the *reddendum* to the mortgagee, his executors, &c., during the mortgage, afterwards to the mortgagor or his executors, &c.; the lessee covenants to and with the mortgagee, and also to and with the mortgagor, to pay the rent "on the several days and times, and in manner as the same was reserved and made payable." Held, a several covenant.[3]

40. A mortgagee of leaseholds joined with the mortgagor in leasing a part of the property for the residue of the term at a certain rent, payable to the mortgagor, his executors, administrators, and assigns. The lease contained a provision for reëntry, in case of non-payment of rent, to the mortgagor, his executors, &c.; also a declaration that nothing therein contained should defeat, impeach, or determine the estate of the mortgagee under his mortgage, so far as the same affected the entirety of the premises. After execution of the deed, the mortgagor became bankrupt. Held, the lessee was entitled to the premises, free of the mortgage; but the mortgagee, and not the mortgagor's assignee, was entitled to the rent.[4]

41. If the mortgagor and mortgagee join in a lease, and the lessee covenants with the mortgagor and his assigns, the covenants, being collateral to the land, will neither descend

[1] 2 Greenl. Cruise, 112, n.
[2] Smith *v.* Pilkington, 1 Tyrwh. 313.
[3] Harold *v.* Whitaker, Q. B. 29, May, 1846; 15 L. J. 345.
[4] Edwards *v.* Jones, 1 Coll. Cha. 247.

at common law to the heir of the mortgagor, nor pass to an assignee of the mortgagee, under St. 32 Hen. 8, but will be covenants in gross, on which actions may be brought by the mortgagor or his personal representatives.[1] So, where the mortgagor made a lease, reciting the mortgage; and after assignment brought an action for rent, upon the covenant; held, the covenants were in gross, and it might well be alleged in the declaration, that the plaintiff had no reversion at the time of the demise, and a plea, that "the reversion was in the plaintiffs at the time of the demise, and before breach the plaintiffs had assigned it to a third person," was bad; there being no recital in the lease, which constituted an estoppel.[2]

42. Where the mortgagee leases, with the concurrence of the mortgagor, the lessee covenanting with both, to pay rent to the former till payment of the mortgage, and then to the latter; the covenant runs with the land till the mortgage is discharged, and then becomes a covenant in gross. While the mortgage continues, the mortgagee is the proper party to bring a suit; and if payment of the mortgage is relied upon in defence, it must be pleaded as a defeasance of the covenant with the plaintiff.[3]

43. Where it appears on the face of a lease, that the legal estate is in the mortgagee or a trustee for him; a right of entry reserved to the mortgagor is void, he being a stranger.[4]

44. The mortgagee may sometimes himself become a lessee. Thus it is held, that, if the mortgagee and the mortgagor join in leasing, and the former takes an underlease from the lessee, the mortgagee holds as tenant, not as mortgagee, and the mortgage is postponed to the lease.[5] So, in the case of Newall *v.* Wright,[6] the mortgagee was himself also a les-

[1] Webb *v.* Russell, 3 T. R. 393; Stokes *v.* Russell, Ib. 678.

[2] Pargeter *v.* Harris, 7 Q. B. Rep. 708.

[3] Whitaker *v.* Harrold, 17 L. J. Q. B. 343, N. S.

[4] Doe *v.* Lawrence, 4 Taunt. 23.

[5] Page *v.* Broom, 4 Russ. 6.

[6] 3 Mass. 138.

see of the estate. Some of the following observations of course relate to this peculiar state of facts; but most of them are of a general character, and throw light upon the several topics discussed in the preceding pages — the *estate* of the mortgagor and of those claiming under him. In that case, Chief Justice Parsons remarks as follows:[1] — "When a man, seised of lands in fee, shall mortgage them in fee, if there be no agreement that the mortgagor shall retain possession, the mortgagee may enter immediately, put the mortgagor out of possession, and receive the profits; and if the mortgagor refuses to quit the possession, the mortgagee may consider him as a trespasser, and may maintain an action of trespass against him, or he may in a writ of entry recover against him as a disseisor. But there may be an agreement, that the mortgagor shall retain the possession until the condition be broken, which shall bind the mortgagee; in which case, the mortgagor may demise the estate to a stranger, and receive the rents to his own use. And upon the same principle, we are satisfied that the mortgagee, if he consent to take a lease from the mortgagor, and covenant to pay him rent until the condition be broken, shall be bound by his covenant, and shall not be admitted to set up his mortgage against the lease. The demise is in law an agreement that the mortgagor shall retain the possession, and receive the profits to his own use. As the lease is for five years, (the case finding that the lease and mortgage were made at the same time,) and as the money secured by the mortgage was to be paid in the same time, it is apparent that the lease and the mortgage were intended to execute one contract; and to give complete operation to both those deeds, it is reasonable to suppose the mortgage first executed. For if the lease had been first executed, and the mortgage intended to control the lease, no reason can be given why the lease was not in fact surrendered, as of no effect between the parties. It is therefore our opinion, that the execution of the first mortgage is no bar to the recovery of the rent due on the lease. Sup-

[1] 3 Mass. 152–154.

pose the question to arise on a lease made by a man seised in fee, who afterwards conveys the premises to the lessee in fee, on condition that the conveyance be void, upon his paying a sum of money to the lessee at a future day. If the lessor, having the reversion in fee, make an absolute conveyance of the estate in fee to the lessee, without doubt the term is extinguished. If he convey the estate in fee to a third person, the rent shall pass, as incident to the reversion. But if he mortgage in fee the estate to a third person, the mortgagee may receive the rent as incident to the reversion, or permit the mortgagor to receive it at his election. If he do no act to show his election to receive the rent, the mortgagor shall recover it of the lessee, who cannot plead the mortgage in bar. But as the mortgagee cannot put the tenant out of possession, if he demand the rent of him, the tenant must pay it to him; and if, after demand, the tenant shall pay it to the mortgagor, he will pay it in his own wrong. In the case at bar, the mortgagee is the tenant, and he cannot demand the rent of himself. If he refuse to pay it to the mortgagor, he must be considered as claiming the rent, if by law he may be entitled to it; and this refusal is a sufficient notice to the mortgagor. The legal effect of this reasoning is, that when the mortgagee shall refuse to pay the rent, the rent is suspended until the condition of the mortgage be performed or the estate be redeemed; and upon either event the rent will again become payable, if the term has not in the mean time expired. And during the suspension, the lessee will, as mortgagee, be accountable for the profits to the mortgagor towards the payment of the debt, first keeping down the interest; and of the value of the profits the reserved rent will *primâ facie* be evidence. If, however, the lessee shall voluntarily pay the rent to the mortgagor, he shall not afterwards be accountable, as mortgagee, for the profits received for the same time."

45. The following summary of the relations between mortgagor and mortgagee is given by Mr. Coote.[1] With what

[1] Coote, 327–330. See Smith's Leading Cases, (Am. ed.) 570, *n.*

qualifications, if any, they may be considered as expressing the rules of law upon this somewhat complicated subject, every reader, in view of the numerous decisions referred to in the present chapter, must decide for himself.

1. If the mortgage provides, that the mortgagor may retain possession till breach of condition; he may be regarded as a tenant for years till such breach; and, upon his death, his interest may vest in his executors, who shall hold in trust for the heirs.

2. After breach of condition, until payment of interest or other recognition of tenancy, he is tenant at sufferance, having rightfully entered, but holding over wrongfully.

3. If there is no agreement for possession, and the mortgagor remains in possession with the mortgagee's consent; he is strictly tenant at will.

4. If, in the latter case, the mortgage is assigned without concurrence of the mortgagor, this terminates the estate at will, and makes the mortgagor tenant at sufferance till payment of interest or other recognition of tenancy; and whenever the mortgagor is a tenant at will, the death of either party terminates such tenancy. Upon the death of the mortgagor, if his heir or devisee enter and occupy without recognition of the mortgagee's title by payment of interest or otherwise, this may be treated as an adverse possession. Upon the death of the mortgagee, the mortgagor becomes tenant at sufferance to his representative, till some recognition of tenancy, and then tenant at will.

5. Wherever a tenancy at sufferance exists, and even where an adverse possession commences, as by the entry of the heir or devisee of the mortgagor without the mortgagee's consent; payment of interest is a recognition of the mortgagee's title, and evidence of an agreement that the mortgagor, or person claiming under him, shall hold at will, and a strict tenancy at will commences.

6. If the estate is occupied by tenants, and the mortgagor allowed to receive the rents, he has been treated as a *receiver*, but not subject to account. The correctness of this view,

however, has been strongly questioned, particularly by Lord Eldon in *ex parte Wilson*.[1]

46. In connection with the subject now under consideration, it is proper to give an account of a judicial controversy, which perhaps is of little practical importance in the United States, where leasehold mortgages are of rare occurrence; but which is found carried on with much earnestness in many English cases. The mortgagor being in general treated as *owner* of the estate, the question arose, whether the mortgagee of a leasehold, like an absolute assignee, became liable upon the covenants in the lease. The following abstracts of the decisions will be sufficient to explain the nature of this discussion.

"In Eaton *v.* Jaques, Doug. 454, decided in 1780, the question arose whether a mortgagee of the lessee of a term, never having taken possession under the mortgage, was liable *as assignee* for rent in arrear, and it was held by Lord Mansfield, and all the other judges of the King's Bench, that he was not. (*j*) It was put upon the ground, that as mortgagee out of possession, he was not *assignee*, because he had not all the estate, right, title, interest, &c., of the mortgagor; that the mortgage was but a security to the mortgagee, the legal estate still remaining in the mortgagor. This decision

[1] 2 Ves. & Beam. 252.

(*j*) "In point of fact, this case must have existed for a century past, in a thousand instances; in this great town, particularly, building leases have been and are perpetually mortgaged; and yet no instance has been found where the ground landlord has attempted to charge the mortgagee, not in possession, with the rent or covenants. This is a strong argument against the plaintiff, especially where the case is so hard, so unjust, and unconscionable. Numberless inconveniences would arise, if such a demand could be supported. The mortgagee never asks whether the rent is paid; he only looks to his security; and, when the principal and interest are paid, he reassigns. But if the plaintiff is right, a mortgagee might be called upon, years after such re-assignment, for arrears or breaches of covenant during the assignment; the consequences would be terrible." Doug. 459.

does not appear to have been satisfactory to the profession in England. Lord Kenyon doubted its correctness in Westerdell *v.* Dale, 7 T. R. 311; and in Stone *v.* Evans, Woodfall, 113, said he would overrule it without the least hesitation; and in Williams *v.* Bosanquet and others, 1 Brod. & Bing. 5 Com. Law R. 72, it was formally overruled upon a consideration of all the previous cases. It was there held, that when a party takes an assignment of a lease by way of mortgage, as a security for money lent, the whole interest passes to him, and he becomes liable on the covenant for payment of rent, though he has never occupied or become possessed of the premises in fact. *Vide* Woodfall, 111, 112, 113; Powell on Mortgages, 233 to 243. The doctrine of Eaton *v.* Jaques is, that when a lessee mortgages his term, his whole interest does not pass to the mortgagee; that until he takes possession, the legal ownership is in the mortgagor, subject to the lien of the mortgagee; that the mortgagee of course is not assignee, as an assignee must take the whole interest of the lessee. Williams *v.* Bosanquet, on the contrary, held, that the whole interest passes by the mortgage, and that the mortgagee consequently becomes assignee, and is liable as such. This precise question arose in the case of Astor *v.* Hoyt and others, 5 Wendell, 603, where the doctrine of Eaton *v.* Jaques was considered as the well-settled and established law of this State. It was there held, that a mortgagor is the owner of the property mortgaged against all the world, subject only to the lien of the mortgagee; and that a mortgagee of a term, not in possession, cannot be considered as an assignee; but if he takes possession of the mortgaged premises, he has the estate *cum onere*, and is liable as assignee upon the covenants contained in the lease. When the mortgagee takes possession, he then has all the right, title, and interest of the mortgagor. Then he acquires, and the mortgagor loses an estate liable to be sold on execution; he is then substituted in the place of the mortgagor who was lessee, and therefore is assignee, and liable as such." [1]

[1] Opinion of the Court in Astor *v.* Miller, 2 Paige, 68.

47. Mr. Coote[1] gives the following somewhat fuller account of the decisions upon this point. In the case of Eaton *v.* Jaques,[2] tried before Mr. Justice Buller in 1780, and the first case in which the point arose *at law;* it was held that the mortgagee is not liable, unless he takes possession. The question was reserved for the Court of King's Bench. It had been considered to be clear law by Lord Chief Justice Holt,[3] that an absolute assignment vested the estate in the assignee before entry; and in equity the same doctrine had been undoubtedly applied to a mortgage. Thus in a case[4] where a lease had been granted with covenants to repair, the lease assigned by way of mortgage, and the mortgagee had never entered; the houses being greatly out of repair, the lessor filed his bill against the assignee for discovery and specific performance. The Court said, it was the mortgagee's folly to take an assignment of the whole term, *and thereby subject himself to the covenants;* but, being only a mortgagee not in possession, the Court would not assist the plaintiff, but leave him to his remedy at law. In another case in equity,[5] where a lease had been assigned by way of mortgage, but the mortgagee had not entered; the lessor recovered at law for rent. Whereupon the mortgagee filed her bill for relief, but it was dismissed, *she being ill advised to take an assignment of the whole term.* The Court of King's Bench, however, seemed to consider these cases of little weight, and decided that the mortgagee was not liable before taking possession. Lord Mansfield said: — "To do justice between men, it is necessary to understand things as they really are, and to construe instruments according to the intention of the parties. Can we shut our eyes and say it was an absolute conveyance? It was a mere security; it was not an assignment of *all* the mortgagor's estate," &c. In this Willes and Ashhurst, Justices, coincided. But Mr. Justice Buller went further, saying, he did not agree that,

[1] Coote, p. 165.
[2] Doug. 438.
[3] Cook *v.* Harris, 1 Ld. Raym. 367.
[4] Sparkes *v.* Smith, 2 Vern. 277.
[5] Pilkington *v.* Shaller, 2 Vern. 374.

even if the assignment was absolute, the action would lie without possession, and added, "there is no instance." In Walker *v.* Reeves,[1] which was a case of *absolute* assignment, Lord Mansfield said: — "By the assignment, the title and possessory right passed, and the assignee became possessed in law, and this case is by no means like Eaton *v.* Jaques, which, being a mortgage, was not an assignment for this purpose; it was a mere security. In the case of Chinnery *v.* Blackburne,[2] it was held that the mortgagee of a ship, not in possession, could not maintain an action for freight. In Jackson *v.* Vernon,[3] that such mortgagee was not liable for goods furnished for the ship. In these cases the doctrine of Eaton *v.* Jaques was recognized. In Westerdell *v.* Dale,[4] Lord Kenyon said: — "As to the cases respecting a mortgagee, whether in or out of possession, he is the legal owner, and must be so considered in a court of law, notwithstanding his title is subject to equitable interests. It is said in one of the cases, that a mortgagee is only liable when in possession, and that what proves this point is, that in charging the mortgagee it is necessary to state in pleading, that he entered and was possessed. But with great deference to the learned judge who gave the reason, I doubt it; I consider those as formal words." In Stone *v.* Evans,[5] an action against the assignee of a lease by way of a mortgage, Lord Kenyon ruled that the defendant was liable; and "as to the case of Eaton *v.* Jaques, he would overrule it without the least reluctance." In the case of Mayor, &c. *v.* Blamire,[6] the point was discussed, but held unnecessary to decide, for the purposes of that action. In the case of Lucas *v.* Comerford,[7] a lease, with covenants for rebuilding, &c., was deposited by the lessee with a creditor for security. The executors of the lessor filed a bill against the creditor for specific performance of the covenants. The defendant in his answer admitted his liability upon the other covenants, but denied

[1] Doug. 461, *n.*
[2] 1 H. Bl. 117, *n.*
[3] Ibid.
[4] 7 T. R. 302.
[5] Woodf. 113.
[6] 8 E. 487.
[7] 1 Ves. Jun. 235.

that he was bound to rebuild. Lord Chancellor Thurlow said: — "It was no matter whether the defendant took the lease as a pledge or as a purchase; he could not take the estate and refuse the burden; it was nothing to the lessor." The prayer for specific performance was refused, but the defendant decreed to execute an assignment, in order that the plaintiff might sue at law. In the case of Williams *v.* Bosanquet,[1] the question was again argued in Serjeants' Inn Hall before ten of the judges, and the authority of Eaton *v.* Jaques expressly overruled.

48. Mr. Greenleaf says:[2] — "It is well settled, as a general doctrine, that a mere legal ownership does not make the party liable in cases like those supposed in the text," (the mortgage of a leasehold interest, containing covenants by the lessee) "without some evidence of his possession also, or of his actual agency. This principle is clearly recognized in the law of shipping; the rule being settled that the mortgagee of a ship does not incur the liabilities of an owner, until he takes possession, or actively interferes in the employment of the vessel." "The assignee in mortgage of a chattel real, not in actual possession, is considered as possessed only as against the assignor, and this by way of estoppel. He is not compelled to take possession; he may intend to acquire nothing more than an equitable lien, or a title by estoppel, and against purchasers with notice. His legal title in that case depends on a legal fiction; and fictions of law serve to effectuate the actual intent of the parties, but never to defeat it. Moreover, it is conceded, that if the mortgagee were to take an assignment of all the term except one day, he would not be liable on the covenants of the mortgagor in the original lease; which shows that even the claim of his liability stands on ground purely technical. But it is clear that before entry the assignee cannot bring trespass; nor can the assignee of a lessee take by release, before entry, to enlarge his estate. Neither has a mortgagee out of possession any interest which can be sold on execution; but the equity

[1] 1 Brod. & B. 238.

[2] 2 Greenl. Cruise, 110, *n*.

of redemption remaining in the mortgagor is real estate, which may be extended or sold for his debts. Nor does the mortgagee derive any profit from the land until actual entry or other assertion of exclusive ownership; previous to which the mortgagor takes the rents and profits, without liability to account. On these grounds, it has been held here, as the better opinion, that the mortgagee of a term of years, who has not taken possession, has not all the legal right, title, and interest of the mortgagor, and therefore is not to be treated as a complete assignee, so as to be chargeable on the real covenants of the assignor. In New Hampshire, it has been held otherwise; and in Virginia, also."

CHAPTER X.

WASTE BY THE MORTGAGOR OR MORTGAGEE, AND REMEDIES THEREFOR.

1. The mortgagor cannot commit waste.
2. Remedy by injunction.
5. By action at law.
10. Injuries done by third persons.
11. Waste by the mortgagee.

1. Although a mortgagor in possession is considered for most purposes the owner of the land, and as such held entitled to the temporary annual rents and profits; yet, inasmuch as the very purpose of the mortgage would be defeated, by any acts affecting the permanent value of the property, the law will in some form interpose, either to prevent the commission of *waste* by the mortgagor, especially if the debt is thereby endangered, or to compensate the mortgagee for the value thus taken from the land.[1] A judgment, however, for waste against the mortgagor will not affect his right of redemption.[2]

2. The usual process against a mortgagor, in relation to the commission of waste, is a *preventive* one; being an injunction from a court of equity. It has been sometimes questioned, whether Chancery would thus interfere. Thus, in Usborne *v.* Usborne,[3] doubts were expressed by the Court whether a mortgagor should be restrained from cutting timber, the mortgagee being in fault for leaving him in possession; but the injunction was granted. In King *v.* Smith,[4] it was held that the Court will not interfere, unless first satisfied that the security is defective. But it seems to be now well settled, that the mortgagee may have an injunction,

[1] Gray *v.* Baldwin, 8 Blackf. 164.
[2] Panthing *v.* Barron, 32 Ala. 9.
[3] 1 Dick. 75. See Van Wyck *v.* Alliger, 6 Barb. 507.
[4] 2 Hare, 239.

even where the debt is not due, if the mortgagor in possession commits waste, or in any way attempts to diminish the value of the property; or, if it consists of personalty, where he is about to remove it beyond the reach of his creditor. Otherwise, a fraudulent mortgagor might, at his pleasure, deprive the creditor of all benefit from his mortgage.[1] More especially, an injunction will always be granted, where the land is scanty security for the debt. So it will be granted against the destruction of underwood, if contrary to the usual course of husbandry; though not of underwood generally, even though the mortgagor is insolvent or a bankrupt.[2] But the later cases hold, that, if the interest of the estate requires that the wood be cut, the Court may make provision for the cutting of it upon the mortgagor's giving security. Thus, where a large proportion in value of pine woodland was burnt over, and it was proper, in order to save the burnt wood from rotting, and for the permanent benefit of the estate in reference to the new growth, that the burnt wood should be cut off, the land without the wood being of small value, and the mortgagor was proceeding to cut it, when the mortgagee obtained an injunction; held, a reference should be ordered to ascertain the value of the wood, in order that the mortgagor might give security.[3]

3. A party, collaterally liable for the mortgage debt, may have an injunction against waste by an assignee of the mortgagor in possession. Thus a purchaser of part of the estate mortgaged may have such injunction, against an assignee for benefit of creditors of another part. The former stands in the light of a surety for the mortgage debt.[4] So a mortgagor in possession, after a sale under decree and execution, will be restrained from committing waste.[5] But a mortgagor will not be compelled to *repair*, where the estate has

[1] Salmon *v.* Clagett, 3 Bland, 180; 5 G. & Johns. 314; Murdock, 2 Bland, 461.

[2] 1 Pow. 165; Humphreys *v.* Harrison, 1 Jac. & W. 581; Hampton *v.* Hodges, 8 Vez. 105; Brown *v.* Stewart, 1 Md. Ch. 87.

[3] Brick *v.* Getsinger, 1 Halst. Cha. 391.

[4] Johnson *v.* White, 11 Barb. 194.

[5] Phœnix *v.* Clark, 2 Halst. Ch. 447.

been injured without his fault;[1] as, to rebuild in case of destruction by fire.[2]

4. If a bill for an injunction to stay waste, brought by a mortgagee against the mortgagor, before the debt is due, contains a prayer for a sale of the premises; such prayer, being repugnant to the other allegations, will be rejected as surplusage, and will be no bar, while pending, to another bill for sale or foreclosure.[3]

5. In addition to the remedy by injunction, it has been held in many cases, that the mortgagee may also maintain an action at law against the mortgagor for waste. (*a*) Thus he is held entitled to an action of replevin for wood and timber wrongfully cut.[4] So in Massachusetts, a mortgagee, not in actual possession, may, after condition broken, maintain trespass against the mortgagor for cutting and carrying to market timber trees.[5] But not for cutting grass, before entry.[6] So in Maine, if a mortgagor in possession cut down and carry away timber trees growing on the land, the mortgagee may maintain an action of trespass against him. Though, if a lot of wild land be purchased, and mortgaged for the price, it has been made a question, whether the mortgagor might not set up a general usage and custom in the country for purchasers in such cases to fell the trees and clear the land, as amounting to a license from the mortgagee.[7] So the mortgagee of timber lands may bring trespass or trover against one who cuts and carries away timber, or afterwards converts it to his own use, though under a license from the mortgagor, subsequent to the mortgage.[8] So, although after such wrongful taking the plaintiff took

[1] Campbell *v.* Macomb, 4 Johns. Ch. 534.
[2] Reid *v.* Bank, &c. 1 Sneed, 262.
[3] Murdock, 2 Bland, 461.
[4] Waterman *v.* Matteson, 4 R. I. 539.
[5] Page *v.* Robinson, 10 Cush. 99.
[6] Woodward *v.* Pickett, 8 Gray, 617.
[7] Stowell *v.* Pike, 2 Greenl. 387.
[8] Frothingham *v.* McCusick, 11 Shepl. 403.

(*a*) In Pennsylvania, a statute so provides. Penn. Stat. 1851, 613. See Higgon *v.* Mortimer, 6 Carr. & P. 116; Farrant *v.* Thompson, 2 D. & R. 3.

from the mortgagor an assignment of his rights under the contract with the defendant; the plaintiff not waiving his rights as mortgagee, and never having derived any benefit from the contract.[1] So in Vermont, if, after a decree of foreclosure, and before the time limited for redemption, the mortgagor cut and carry away timber, the mortgagee may recover its value in an action on the case in the nature of waste, or in trover.[2] But a mortgagee cannot maintain trover against the mortgagor or his tenant for wood cut for fuel, though removed after foreclosure, and though the debt exceeds the value of the land.[3] So, in New Hampshire, where there are two mortgages, and the mortgagor, or one claiming under him, without consent of either mortgagee, cuts timber from the land, and the first mortgage is afterwards discharged, the second mortgagee or his assignee may maintain an action of trespass.[4] Thus a mortgagor conveyed the land, taking back a mortgage to secure the price, which mortgage he afterwards assigned to the plaintiff. The purchaser being in possession, the defendant cut timber under a license from him, without consent of either mortgagee, and the first mortgage debt was afterwards paid. Held, the plaintiff might maintain trespass against the defendant.[5]

6. In Hitchman *v.* Walton,[6] an action on the case was maintained, in favor of a mortgagee as reversioner against the mortgagor's assignees, for injury to the land by removal of *fixtures*. And in Maine, if the assignee of the mortgagor remove fixtures from the land, though erected after execution of the mortgage by the mortgagor; the assignee of the mortgagee, who held the mortgage at the time of such removal, may recover their value in an action of trespass.[7] The assent of the mortgagee to the erection of such fixtures does not vary his rights in this respect.[8] But it has been held in Connecticut, that a purchaser from the mortgagor, of a

[1] Frothingham *v.* McCusick, 11 Shepl. 403.
[2] Langdon *v.* Paul, 22 Verm. 205.
[3] Wright *v.* Lake, 30 Verm. 206.
[4] Sanders *v.* Reed, 12 N. H. 558.
[5] Sanders *v.* Reed, 12 N. H. 558.
[6] 4 Mees. & W. 409.
[7] Smith *v.* Goodwin, 2 Greenl. 173; Frankland *v.* Moulton, 5 Wis. 1.
[8] 5 Wis. 1.

fixture severed from the land, has a better title to it than the mortgagee. Thus, in case of a mortgage of land, upon which was erected a grist-mill; after a decree of foreclosure by the mortgagee, and a judgment in ejectment for possession, but during the time limited for redemption, and before possession taken by the mortgagee, the mortgagor severed the stones from the mill, and sold them. The mortgagee takes possession of the stones as his property, and the purchaser brings trover against him. Held, the plaintiff should recover.[1]

7. In New York, it has been held that a mortgagee, before forfeiture, cannot bring an action for waste against the mortgagor. His interest in the lands is contingent, and may be defeated by payment of the mortgage debt. In this respect, he is like a tenant for life, who cannot sue for waste, because his interest may never come into possession. The remedy is an injunction in equity.[2] But a more recent case decides, that an action on the case will lie by the holder of a mortgage, against the mortgagor or a purchaser from him, for waste committed with a knowledge that the value of the security will be injured thereby. As where the premises were a scanty security for the debt, and a purchaser from the mortgagor took away the fences, and cut down and carried away valuable timber, with a knowledge of the existence of the mortgage, and of the insolvency of the mortgagor. So, although the primary motive of the defendant was not to injure the plaintiff's security, but a view to his own emolument.[3]

8. It is held in New Hampshire, that, if the cutting of timber has been expressly or impliedly authorized by the mortgagee, when cut, it belongs to the mortgagor; otherwise, the mortgagee may either have an injunction in equity or an action at law, or claim the timber itself, unless the rights of third persons have intervened.[4] And a similar rule has been adopted in Maine. Thus the plaintiff conveyed a

[1] Cooper *v.* Davis, 15 Conn. 556.
[2] Peterson *v.* Clark, 15 Johns. 205, 207.
[3] Van Pelt *v.* McGraw, 4 Comst. 110.
[4] Smith *v.* Moore, 11 N. H. 55.

portion of a tract of timber land, of which he was the owner, taking back a mortgage for the price, and gave a bond to convey the remainder, on payment of a certain sum; but nothing had been paid for the land. The defendant's intestate became assignee of the claim to the land under the mortgage and bond, and being, with the knowledge of the plaintiff, in quiet and peaceable possession of the premises, cut timber and wood therefrom; one third being upon the land described in the bond, the rest on that described in the mortgage. The defendant having inventoried the lumber cut, and sold a part of it; and the plaintiff having before the sale demanded the property of him; held, the plaintiff might maintain trover for the value.[1] And in another case,[2] the plaintiff having received a mortgage of timber land, and the condition having been broken, certain timber was cut from it under permits from the mortgagors, but without the knowledge or consent of the mortgagee. The defendant purchased the timber without notice of the mortgage, and the plaintiff afterwards seized it. By agreement, it was subsequently manufactured into boards and sold; the proceeds to be subject to the decision of the Court as to the legal right of either party to the same. The plaintiff brings assumpsit; and it was agreed that judgment should be rendered for the plaintiff, if the seizure of the timber was legal, or if he had the right of possession against the defendants. Judgment was rendered for the plaintiff. The Court say: — "According to the decisions in Massachusetts the plaintiff is clearly entitled to judgment. The principles established by these decisions are necessary for the security of the mortgagee. It often happens, that the timber upon wild or unimproved land constitutes its principal value. The timber is as much a part of the realty as the land itself. A third person purchasing the timber, which is a part of the security, takes it subject to the paramount rights of the mortgagee, as much as if he had purchased the land."[3]

[1] Bussey *v.* Page, 2 Shepl. 132.
[2] Gore *v.* Jenness, 1 Applet. 53.
[3] Gore *v.* Jenness, 1 Applet. 55.

9. A mortgagor, who cuts wood upon the land after a decree of foreclosure, is a trespasser. Hence, where wood so cut was attached by his creditors, and sold by the sheriff, but remained on the land till after the right of redemption had expired, and the mortgagee then entered and forbade its removal, and sold and used part of it himself; held, the purchaser had gained no title to the wood, and was not bound to pay for it.[1] And in case of waste, committed after such decree, an injunction will be ordered, though not asked by the bill.[2]

10. It has been held, that a mortgagee has not a sufficiently vested, immediate, and direct title to the property, to maintain an action for injuries done to it *by a third person*, unless they are committed with the express intent to wrong and defraud him, and the mortgagor is insolvent or unable to pay the mortgage debt. Thus, where an action was brought by the assignee of a mortgage, for prostrating and destroying certain buildings on the land, by which the value was reduced and the plaintiff greatly damnified; it was held to be a fatal obstacle to a recovery, that the plaintiff had not alleged in the declaration the insolvency of the mortgagor, or his inability to pay the mortgage debt.[3] And, in another case,[4] the Bank of Utica had a judgment against McBride, which bound his lands. The plaintiffs held junior mortgages against McBride, which bound the same lands. The plaintiffs bring an action against the defendant, alleging that he, as sheriff, in executing a *fi. fa.* issued at the suit of the Bank of Utica, so negligently managed the personal property of McBride, that it did not bring its full value by $1,000, so that this sum came in upon the mortgaged land and other lands, and took so much out of the plaintiffs' pockets. It was held, that the action could not be maintained, although the Bank of Utica or McBride himself might bring a suit, they being the parties *immediately* wronged. So the plaintiff, as holder of a mortgage, brought an action against the

[1] Lull *v.* Matthews, 19 Verm. 322.
[2] Goodman *v.* Kine, 8 Beav. 379.
[3] Lane *v.* Hitchcock, 14 Johns. 213.
[4] Bank, &c. *v.* Mott, 17 Wend. 554.

defendant for *negligence* in removing earth from a hill adjacent to the mortgaged premises, whereby portions of the hill were made to slide down upon those premises, and thereby greatly injured them. It was held, that the action could not be maintained, although it might lie, if the act charged had been done with intent to defraud the plaintiff, and if the plaintiff proved that the mortgagor was insolvent or unable to pay the mortgage debt.[1]

11. At law, a *mortgagee* may commit waste, unless he has expressly covenanted against it.[2] But equity will enjoin against it, unless the security is defective, and decree an account of timber already cut. And a mortgagee will be required to apply the value of timber cut, first to the interest, then to the principal, of his debt.[3] So a mortgagee must account for the proceeds of timber cut by a third person, which are received by him.[4] But a mortgagee of land, containing a mine previously wrought, may work such mine.[5] So a mortgagor cannot charge the mortgagee in possession for waste by clearing and cultivating the land, and also with the improved rent arising from such clearing; though it seems he may claim either at his election.[6] So an assignee of the mortgagor, seeking relief as such, cannot hold the mortgagee accountable for waste committed before the assignment.[7]

12. The rule in equity, against the commission of waste by a mortgagee, has been applied to the destruction or injury of *buildings*. Thus, the bill being to redeem a mortgage, on the hearing, an account was decreed, and £240 reported due; to which report the defendant had excepted. The cause thus standing in court, the Lord Keeper, on a motion and reading affidavits that the defendant had burnt some of the wainscot and committed waste, ordered the

[1] Gardner *v.* Heartt, 3 Denio, 232.
[2] Evans *v.* Thomas, Cro. Jac. 172; but see McCormick *v.* Digby, 8 Blackf. 99.
[3] Wetherington *v.* Banks, Sel. Cas. Cha. 30; Hanson *v.* Derby, 2 Vern. 392; Farrant *v.* Lovel, 3 Atk. 723.
[4] Gore *v.* Jenness, 1 Apple. 53.
[5] Irwin *v.* Davidson, 3 Ired. Ch. 311.
[6] Morrison *v.* McLeod, 2 Ired. Ch. 108.
[7] Gordon *v.* Hobart, 2 Story, 243

defendant to deliver up possession to the plaintiff, who was a pauper, giving security to abide the event of the account.[1] So, if the mortgagee unnecessarily pulls down buildings, and erects new ones, without the mortgagor's consent, he is liable for any consequent loss of rent, and will not be allowed for lasting improvements and repairs, unless the result of the whole is to increase the value of the property.[2]

13. On a bill to redeem, the mortgagor claimed that a master, to whom the case had been referred, should have allowed treble damages for waste committed by the mortgagee, pending the bill. Held, such claim could be enforced only by the statutory remedy.[3] (*b*)

[1] Hanson *v.* Derby, 2 Vern. 392.
[2] Coote, 429; Sandon *v.* Hooper, 6 Beav. 246.
[3] Boston, &c. *v.* King, 2 Cush. 401.

(*b*) Lord Hardwicke thus sums up the law relating to waste committed by mortgagee or mortgagor. Where a mortgagee in fee in possession commits waste by cutting down timber, and the money arising by the sale of the timber is not applied in sinking the interest and principal of his mortgage, the Court, on a bill brought by the mortgagor to stay waste, and a certificate thereof, will grant an injunction. So, likewise, where there is only a mortgage for a term of years, and the mortgagor commits waste, the Court, on a bill by the mortgagee to stay waste, will grant an injunction, for they will not suffer a mortgagor to prejudice the incumbrance. Farrant *v.* Lovel, 3 Atk. 723.

CHAPTER XI.

ESTATE OF THE MORTGAGEE. NATURE OF HIS TITLE. CONNECTION BETWEEN THE MORTGAGE AND THE PERSONAL SECURITY.

1. A mortgage is *personal estate*. The mortgagee has a mere *lien* or *pledge*.
Transfer of mortgage without the debt.
3. Assignment of the debt; whether it passes the mortgage; doctrine upon this subject in the several States; mortgage to secure several debts, some of which are transferred; assignment of different debts to different persons.
20. The mortgagee cannot make a *lease*.
21. He has an *insurable* interest. Rights and duties of parties in case of the insurance of mortgaged property.
37. The assignment of a mortgage is the assignment of an *estate*, not a mere *security*.
38. Case of *Martin* v. *Mowlin*, and criticisms thereupon.
41. Joint mortgagees; their interest in the mortgage and the personal security.
46. A mortgage is not subject to legal process.
51. Passes as personal property, upon the death of the mortgagee.
58. By what words *devised*.
59. Respective titles of *heir* and *executor*; nature of the interest in the executor's hands; sale for payment of debts, &c.

1. The proposition having been fully explained in preceding chapters, that the mortgagor, notwithstanding the mortgage, still continues to *own*, instead of having *a mere prospective or contingent right* to the land; it follows, as a matter of course, that the mortgagee has an interest in the property mortgaged, quite distinct from an ordinary title to land. Accordingly the doctrine is equally well established, that a mortgage, though purporting to convey an estate in fee-simple, yet being merely security for, or incident to, a debt, (*a*)

(*a*) Upon this ground, where separate mortgages are made of distinct estates, but to secure one debt; it is held, that the unity of the mortgage is to be determined by the debt. Franklin *v.* Gorham, 2 Day, 143. In general, where an action lies for the debt, it may also be brought upon the mortgage. Barroilhet *v.* Battelle, 7 Cal. 450. Perhaps no stronger exception can be found to the general rule as to the identity of the debt and mortgage, than that involved in a late decision, that, if the indorser of a note

follows the nature of the debt itself, and, so long as the right of redemption continues, is personal estate. Both in law and equity the mortgagee has only a chattel interest;[1] sometimes termed, though hardly with technical accuracy, a *chattel real*.[2] In *common sense*, he has only a *pledge*.[3] He is not the *substantial* owner.[4] (*b*)

2. In Martin *v.* Mowlin,[5] Lord Mansfield is reported to have said, that "a mortgage is a charge upon the land; and whatever would give the money, will carry the estate in the land along with it, to every purpose. The estate in the land is the same thing as the money due upon it. It will be liable to debts; it will go to executors; it will pass by a will not

[1] Runyan *v.* Mersereau, 11 Johns. 534; 1 Pow. 252, n.; Rayland *v.* The Justices, &c. 10 Geo. 65; Calkins *v.* Calkins, 3 Barb. 305; Fleet *v.* Youngs, 11 Wend. 525; Waring *v.* Smith, 2 Barb. Ch. 135; Kinna *v.* Smith, 2 Green, Ch. 14; Whitney *v.* French, 25 Verm. 663; Bennett *v.* Taylor, 5 Cal. 461; Ord *v.* M'Kee, Ibid. 515; Crow *v.* Vance, 4 Iowa, 434; Savage *v.* Dooley, 28 Conn. 411; Bryan *v.* Butts, 27 Barb. 505.

[2] Burrill's Law Dict.

[3] Silvester *v.* Jarman, 10 Price, 84; M'Millan *v.* Richards, 9 Cal. 365.

[4] Dougherty *v.* McColgan, 6 Gill & J. 275.

[5] 2 Burr. 978.

---

gives a mortgage to the indorsee, conditioned to *pay or cause to be paid* such note; the validity of the mortgage is not affected by the indorsee's failure to give the indorser the notice requisite to make him liable upon the note. Hilton *v.* Catherwood, 10 Ohio, 109. See, as to the effect of *waiver* of notice, Phillips *v.* Thompson, 2 John. Ch. 418. The price of land purchased was paid by the indorsement of two notes of a third person, secured by mortgage, the condition of which was, that the notes, when due, should be paid by the makers or indorser, otherwise the mortgagee's estate to be absolute. The notes not being thus paid, and the mortgagee having failed to hold the indorser according to law, held, in a suit for foreclosure, his estate had become absolute. Zekind *v.* Newkirk, 12 Ind. 544.

(*b*) In a late case, the *personal* quality of a mortgage is expressed by the following combined epithets: — "Pledge; real lien; chattel interest; chose in action and *quasi* personal." It is added, however, "As it binds land, and may lay the foundation of a title to real estate, it assumes, in many respects, the character of a land title. It is so in its origin, by deed; in the mode of giving it notoriety, by registration; in its transfer, by deed of assignment; its discharge, by deed of release; and in the mortgagee's remedy, by writ of entry against the mortgagor or other person in possession under him." Per Shaw, C. J. Young *v.* Miller, 6 Gray, 153.

made and executed with the solemnities required by the statute of frauds. The assignment of the debt, (*c*) or forgiving it, will draw the land after it, as a consequence — nay, it would do it, though the debt were forgiven only by parol; for the right to the land would follow, notwithstanding the statute of frauds." So Lord Keeper Finch says: — "In natural justice and equity, the principal right of the mortgagee is to the money, and his right to the land is only as security for the money." [1] So Lord Loughborough says: — "The real transaction is an assignment of a debt from A. to B.; but that debt is collaterally secured upon a real estate. The debt, therefore, is the principal thing." [2] And Kent, C. J., says: — "Until foreclosure, or at least until possession taken, the mortgage remains in the light of a *chose in action*. It is but an incident attached to the debt, and in reason and propriety it cannot and ought not to be detached from its principal. The mortgage interest, as distinct from the debt, is not a fit subject of assignment. (*d*) It has no determinate value. If it should be assigned, the assignee must hold the interest at the will and disposal of the creditor who holds the bond. '*Accessorium non ducit, sed sequitur principale.*'" [3] (*e*) So it is held, that if a mort-

[1] Per Finch, L. K., Thornbrough *v.* Baker, Cas. in Cha. 1, 285.

[2] Matthews *v.* Wallwyn, 4 Ves. 128; Dudley *v.* Cadwell, 19 Conn. 218.

[3] Jackson *v.* Willard, 4 Johns. 43; Wilson *v.* Troup, 2 Cow. 195; McGan *v.* Marshall, 7 Humph. 121; Thayer *v.* Campbell, 9 Mis. 280; Garroch *v.* Sherman, 2 Halst. Ch. 219; Edwards *v.* Varick, 5 Denio, 664; Bailey *v.* Gould, Walk. Ch. 478.

(*c*) Even a qualified indorsement of a note. Stewart *v.* Preston, 1 Branch, 10.

(*d*) The assignment of a mortgage, without the debt, creates at most *a naked trust*. 2 Story's Eq. 1023, n.

(*e*) The generality of the language found in the text may profitably be limited and controlled by the following remarks, which in their connection are equally true. "A mortgagee, especially after entry for foreclosure, is considered as having a legal estate, which may be alienated and transferred by any of the established modes of conveyance, subject only, until fore-

gage given to secure a bond is assigned, the assignee can maintain no action upon it, unless he has also an interest in the bond; because he can have no conditional judgment.[1] (*f*) More especially, a deed of the land from the mortgagee is held not an assignment of the mortgage.[2]

[1] Webb *v.* Flanders, 32 Maine, 175.

[2] Peters *v.* Jamestown, &c. 5 Cal. 334. But see ch. 18.

---

closure, to be redeemed by the mortgagor." Per Shaw, C. J., Hunt *v.* Hunt, 14 Pick. 379, 380. "By force of the mortgage deed, the mortgagee becomes seized of the estate, and the mortgagor, until discharge or foreclosure of the mortgage, is *quasi tenant* at will of the mortgagee, and so the possession of the mortgagor is that of the mortgagee." Ibid. 382. So in regard to the *possession* of the mortgagee, it is said: — "Although a mortgagee may enter at any time, yet, *until he enters*, the land must be considered as belonging to the mortgagor." Per Parker, C. J., Hatch *v.* Dwight, 17 Mass. 299. And it was accordingly held, that a mortgagee, as soon as he takes possession, but not before, may maintain an action against one who erects a dam, whereby an ancient mill-site on the premises is rendered useless; and the measure of damages will be the interest on the value of the site or privilege, from the time when the plaintiff's right of action accrued. Hatch *v.* Dwight, 17 Mass. 289. "If any new act or ceremony is required, in order to change the nature of the estate in the mortgagees, or to give them a new title, their entry for the condition broken may be considered as such act. They do in fact acquire by it a new and different estate. No lapse of time, without such entry, would ever give them an absolute estate. Even if the mortgagee enters before condition broken, no length of possession under such an entry will make his title absolute. The mortgage then may be considered as conveying to the mortgagee the rents and profits of the land, to be received, if there be no agreement to the contrary, toward the discharge of his debt, whether the condition is broken or not; and also as transferring to him *a right of entry* for the condition broken. On the happening of that event, if he thinks proper to make such an entry, he acquires a new right to the land, which can be defeated only by payment of the debt, within the three years limited by the statute." Per Jackson, J., Goodwin *v.* Richardson, 11 Mass. 474. So it is said, the mortgagor has the legal title, and the mortgagee's interest is not real estate, till foreclosure *or entry*. Van Duyne *v.* Thayer, 14 Wend. 235, 236; Dougherty *v.* Randall, 3 Mich. 58; acc. Felch *v.* Taylor, 13 Pick. 139. But see Ritger *v.* Parker, 8 Cush. 149.

(*f*) The following cases illustrate the general principle stated in the text.

3. It will be observed, that, in the remarks and decisions above cited, as to the *personal* nature of a mortgage, and its

---

In a bill for foreclosure, it appeared that the defendants, Bill and Crane, on the 26th of August, 1818, mortgaged to the plaintiff two distinct house-lots, to secure the purchase-money of one of them, which was at that time conveyed to the mortgagors. The mortgage was duly recorded. April 9, 1817, Bill had made a mortgage, duly recorded, of one of the lots, to Crane, to secure $1,000. September 22, 1818, this mortgage was assigned to Fare, of whom one of the defendants is administratrix, and claims by her answer a priority over the plaintiff, as to the lot contained in the first mortgage. Held, such claim should not be sustained. The Court say : — "The interest of Crane, as mortgagee, was not at the time of the execution of the mortgage to the plaintiff, an interest in the land, capable of being the subject of sale, either absolutely or by way of mortgage, distinct from the debt it was intended to secure. It does not appear that the debt to Crane was even due, when the mortgage to the plaintiff was executed; and it is clearly to be inferred that the mortgage had not been foreclosed, or possession taken under it. Though such a mortgage interest may be, by way of extinguishment, absolutely released to the party having the equity of redemption, yet it cannot be conveyed as a still subsisting interest, by way of mortgage, because that would separate the debt and the pledge, the latter to reside in one person, while the debt resided in another. No such absolute release was intended in this case; and the act of Crane, in uniting the mortgage with Bill, is rather to be referred to the legal estate which he derived from the plaintiff, than to his interest as such a mortgagee. He had an interest, which he was capable of mortgaging, and which he no doubt intended to mortgage, and the mortgage deed can have full operation by being applied to that interest. It cannot be applied to his interest as a mortgagee in the other lot, because he had no interest, in that character, capable of alienation, so long as he retained the debt." Decreed, that all the premises be sold, with a reservation of the junior right of the administratrix, to the proceeds of the lot, the mortgage of which was assigned to her intestate. Aymar *v.* Bill, 5 Johns. Ch. 570, 571, 572. See Jackson *v.* Myers, 11 Wend. 533; Olmsted *v.* Elder, 1 Seld. 144; Raymond *v.* Raymond, 7 Cush. 605. In Jackson *v.* Bronson, 19 Johns. 325, which was an action of ejectment, the plaintiff, to prove his title, offered in evidence a deed to him from Earl, and showed that the defendant was in possession of a part of the land thus conveyed. The defendant proved a mortgage from the plaintiff to Earl of the whole lot, to secure a certain sum to the estate and to indemnify Earl, and a deed from Earl to the defendant of the premises in question. It was held, that the action should be maintained, upon the ground that the mortgage

legal identity with the debt which it is made to secure, frequent reference is had to the mode of *transferring* or *assign-*

was a mere incident to the debt which it was meant to secure, and an absolute deed of the land by the mortgagee was a mere nullity. In another case, Mr. Justice Kent remarks, that the estate in the land is the same thing as the money due on the note; is liable to debts; goes to executors; passes by a will not conformable to the statute of frauds; is transferred or extinguished by an assignment, or even a parol forgiving of the debt. The land is but appurtenant to the debt. Whoever owns the latter, is likewise owner of the former. There must be something peculiar in the case, some very special provision of the parties, to induce the Court to separate the ownership of the note from that of the mortgage. In the eye of common sense and of justice, they will generally be united. Upon these grounds Judge Kent held, that the *delivery* of a mortgage, accompanying the indorsement of a note, which it was made to secure, passed the mortgage as well as the note. Mr. Justice Radcliff, on the other hand, held, that the legal title to the land did not pass, although the assignee acquired an equitable interest which a court of equity would sustain; that although, as *between mortgagor and mortgagee*, the mortgage was to be regarded as personal estate, so as to pass to executors, or be extinguished by payment of the debt, yet it could not be so regarded, in reference to a transfer to third persons. In a subsequent case, Judge Kent adheres to his former doctrine, that at law, as well as in equity, the mortgage is regarded as a mere incident attached to the debt. Johnson *v.* Hart, 3 Johns. Cas. 329, 330; Green *v.* Hart, 1 Johns. 580; Jackson *v.* Willard, 4 Johns. 43; Runyan *v.* Mersereau, 11 Johns. 534. In New Jersey it has been held, that the principle above stated does not dispense with the necessity of a formal assignment of the mortgage to one who pays and takes up the personal security, in order that he may defend against a suit for the land by the mortgagor. And where an informal assignment was first taken, another formal assignment, made after commencement of suit, will be ineffectual as a defence to the action. In such case the mortgagee holds the mortgage in trust for the party who pays the debt, but the latter has no legal title. Den *v.* Dimon, 5 Halst. 156. In the same State, it is held, that the mortgage and debt may be separated; the lien may be surrendered by other transactions, and the debt still remain. Clark *v.* Smith, Saxt. 121. Bond and mortgage. The mortgage is invalid without the bond, unless it be shown that the mortgagee is entitled to possession of it. So, in case of an assignee of the mort. Garroch *v.* Sherman, 2 Halst. Ch. 219.

In New Hampshire, the interest of the mortgagee is held not to be within the statute of frauds, for the reason that it is a mere incident to the debt,

ing mortgages. The prevailing doctrine upon this subject undoubtedly is, that an assignment of the debt carries the mortgage with it. This rule, however, is by no means universal, and is subject to various qualifications in the different States of the Union.

4. In New York, as has been already seen, it has been often recognized in the earlier cases. And it has been since held, that an assignment of a mortgage by an individual or corporation, without seal, passes the mortgage debt.[1] So an assignment of a judgment for part of a debt secured by mortgage, "with full power to take all necessary proceedings for its recovery," is an assignment of the debt, and carries an interest in the mortgage *pro tanto*.[2]

5. In Massachusetts, no interest in a mortgage deed can be transferred or assigned, without a written and sealed instrument. Thus one Earle, holding a mortgage from Adams, to secure six notes, on the 20th of November, 1815, deposited with a scrivener two of the notes and the mortgage, for the purpose of having an assignment made to Warden, as security for the debt due from Earle to him. November 27th, Earle indorsed one of the notes to Hamilton, as part security for a debt, and assigned the mortgage and the mortgaged premises to Hamilton, by deed duly

[1] Gillett *v.* Campbell, 1 Denio, 520. [2] Pattison *v.* Hull, 9 Cow. 747. See Green *v.* Hart, 1 Johns. 580.

---

has no value independent of the debt, and cannot be separated from it. Southerin *v.* Mendum, 5 N. H. 432.

Mortgage to secure several bonds, which the mortgagee assigns to different persons, also assigning the mortgage to one of them. Held, *pro tanto*, an assignment of the mortgage to each. Stevenson *v.* Black, Saxt. 338.

Also, that if the assignee of the mortgage and one of the bonds purchase the equity of redemption, the mortgage is extinguished to the extent of such bond, but not as to the others. Ib.

From the text of the following pages, it will appear, that the decisions upon this subject have been very various in the different States, and not always reconcilable in the same State.

acknowledged and recorded the same day. November 28th, Earle made an assignment of the mortgage, by a writing upon the instrument itself, to Warden, to secure his claim and some others for which he was liable. The assignment was not acknowledged or recorded. The mortgage and the two notes still remained in the scrivener's hands. Hamilton, at and before the time of taking his assignment of the mortgage, knew that the mortgage had been left with the scrivener for the purpose aforesaid. Held, upon these facts, the title of Hamilton must prevail. The Court remarked as follows: — "By force of our statutes, regulating the transfer of real estates, and for preventing frauds, no interest passes by a mere delivery of a mortgage deed, without an assignment in writing and by deed. An assignment, made by a separate deed, without the delivery over of the original mortgage deed, conveys all the interest of the mortgagee, and makes the grantee the assignee of the mortgage." Nor did the knowledge of Hamilton, as to the intended assignment to Warden, affect his title, any more than if he had known that another creditor had taken incipient measures to attach the premises, and by his vigilance had obtained a prior lien.[1] And in a late case, being a suit for foreclosure, brought by the indorsee of a mortgage note, Shaw, C. J., says, the proceeding is "so contrary to settled notions here, that it seems quite startling."[2] And, *à fortiori*, it is held, that, where there are two notes, an indorsee of one, without an assignment of the mortgage, cannot sue to foreclose.[3]

6. But in the same State it is held, that, where a mortgage is assigned with one of the two mortgage notes, so far as it is security for that note; the mortgage shall be held, first to pay that note, then in trust for payment of the other; and an assignee, having record notice, will be bound to this application of the security.[4] So where a subsequent legal transfer of a mortgage is attended with any circumstances of

[1] Warden *v.* Adams, 15 Mass. 233, 236, 237.
[2] Young *v.* Miller, 6 Gray, 153.
[3] Young *v.* Miller, 6 Gray, 152.
[4] Bryant *v.* Damon, 6 Gray, 564.

fraud; even a court of law will not sustain an action by such assignee, against a title of the defendant arising under a prior delivery of the note and mortgage, of which the plaintiff had notice. Thus Haven and Hemmenway, the administrators of a deceased mortgagee, in making a settlement with Valentine, the guardian of his heirs, passed into his hands certain notes, including the mortgage note, and also the mortgage deed. The notes were not indorsed, nor the mortgage assigned in writing, but the administrators gave Valentine a power of attorney to act in their names, in order to enable him to realize the full benefit of the effects put into his hands. Valentine entered for breach of condition of the mortgage. The plaintiff, a subsequent mortgagee, produced a discharge of the first mortgage, made by Haven, the surviving administrator, many years after the assignment to Valentine. The defendant claimed under a lease from Valentine, made under a power of attorney from the heirs of the first mortgagee, who had become of full age. The plaintiff had notice of the assignment to Valentine. It was held, that the delivery of the securities and the power of attorney vested in Valentine an equitable title, which could not be defeated by the fraudulent transaction above stated, between the plaintiff and Haven; and that Valentine, under the circumstances, might legally have received the debt, delivered up the note, and cancelled the mortgage; and the action, which was *assumpsit* for use and occupation, was not sustained.[1]

7. In New Hampshire it is held, that the delivery of a note, payable to bearer and secured by mortgage, passes the mortgage also, both in law and equity.[2] And a parol transfer of the debt and mortgage is good, until proceedings have been had to enforce the mortgage. The assignee may sue in his own name, though he could not upon the debt. And the mortgagee cannot maintain an action where the assignee can.[3]

[1] Cutler *v.* Haven, 8 Pick. 490.
[2] Southerin *v.* Mendum, 5 N. H. 420.
[3] Rigney *v.* Lovejoy, 13 N. H. 247.

8. In the same State, a series of cases have occurred, more particularly relating to the interest of the mortgagee *in the land*, and the effectual mode of transferring such interest, as connected with the debt. Thus, in the case of Bell *v.* Morse,[1] Richardson, Ch. J., says: — "Under certain circumstances, a conveyance of the land by a mortgagee will pass the debt secured. But there are certain cases in which a deed of the land by the mortgagee will pass nothing. Thus, if the mortgagee has transferred the note, he cannot afterwards convey the land. It is not enough to show a deed from a mortgagee, in order to prove that the land passed, but it must be made to appear that the debt passed to the grantee. At least, it must appear that the mortgagee had a right to transfer the debt. As no account is given of the debt, the tenant is not entitled to hold the land against the demandant." And in another case in the same State it is held, that the interest of a mortgagee is not, in fact, real estate; but he is entitled to have it treated as such, so far as necessary to enable him to prevent waste, and a diminution of the value of the land, or to receive the rents and profits; and to give him the full benefit of his security, and proper remedies for any violation of his rights. But not to enable him to sell and convey his mortgage interest. In this respect, the mortgage is a mere chattel, and can be transferred only with the debt. The mortgagee's deed, alone, without foreclosure or entry, and purporting to convey the land only, will not pass the debt, and, therefore, will not pass the mortgagee's interest. And a doubt is expressed whether it would, if it appeared that he had possession and control of the debt or of the land, at the time.[2] So in later cases it is held, that while, after a mortgagee has entered, his deed will transfer his right of possession to the grantee, who, by virtue of it, may defend against a writ of entry by the mortgagor;[3] a deed before entry will convey no interest, unless the debt be transferred; notwith-

[1] 6 N. H. 210; Whittemore *v.* Gibbs, 4 Fost. 484.

[2] Ellison *v.* Daniels, 11 N. H. 274; Parish *v.* Gilmanton, Ib. 298.

[3] Smith *v.* Smith, 15 N. H. 55.

standing an entry by the grantee. So, in other cases, that a quitclaim deed by a mortgagee will convey no title, unless the mortgagee has entered, or the debt is transferred. In the same cases the question is suggested, whether a deed of the land, with warranty, will transfer the debt.[1] So, if a mortgage be conditioned for the payment of money, and there be no other security for the debt than the mortgage, whether a deed of the land will transfer the debt. But where a mortgage was made to indemnify the mortgagee, as surety upon a bond for the mortgagor, and the mortgagee made a settlement with the obligee, to which the mortgagor was a party, and paid him the sum of $500; and then, not having entered, released all his interest in the premises, but made no transfer of the debt: held, his deed conveyed no title.[2] So, where a mortgagee gave a quitclaim deed, purporting to convey his interest in the land, and the consideration expressed was paid for the mortgage interest, and the parties believed, at the time, that the mortgagee's interest in the mortgage and the debt would pass; held, nothing passed by the deed.[3] (*g*)

[1] Weeks *v.* Eaton, 15 N. H. 145; Furbush *v.* Goodwin, 5 Fost. 425.

[2] Weeks *v.* Eaton, 15 N. H. 145.

[3] Furbush *v.* Goodwin, 5 Fost. 425.

(*g*) In the same State, a mortgage to secure several notes remains security for the whole, till payment, in whosesoever hands they may be. Johnson *v.* Brown, 11 Fost. 405. A transfer of the mortgage notes passes the mortgage, more especially where the latter is delivered. Blake *v.* Williams, 36 N. H. 40. An assignment of one note passes the mortgage *pro tanto*. If the other notes are paid, the assignee may sue to foreclose. If a part of the notes are assigned with the mortgage, the mortgagee and subsequent assignee of the other notes retain an interest in the mortgage, and the first assignee cannot discharge it. Page *v.* Pierce, 6 Fost. 317. The mortgage is presumed to go with the note. Hence, in a suit by the indorsee, if the plaintiff is notified to produce the mortgage, its contents may be shown by other evidence. Downer *v.* Button, 6 Fost. 338.

If a mortgage is given to secure several notes, held by different individuals, in a suit on one note, the judgment must be taken upon the whole land. Johnson *v.* Brown, 11 Fost. 405.

9. In Maine, it is said,[1] — "A mortgagee, before he can obtain his conditional judgment, must file or produce in Court the bond or note on which the mortgage is founded; that the Court may know what payments have been made, and how much is due in equity and good conscience. For such sum only can the conditional judgment be rendered; and if all the debt has been paid, or if the mortgagee has assigned the bond or note for a full consideration, there is no reason why he should have any judgment, though he never has assigned the mortgage." Mellen, C. J., further remarks: — "The principles of law upon this point have never been carried so far" (as in New York) "in Massachusetts, or in this State. Our statute of 1821, ch. 36, seems decisive of this question; and to require that the assignment of a mortgage should be made by deed. The form of declaring in an action by the assignee of a mortgage against a mortgagor shows this; it is always alleged, that by the mortgage the mortgagee became *seised in fee;* this very averment shows that such an estate cannot be conveyed to the assignee but by deed." In the same State it has since been held, that the assignment of a debt by an instrument not under seal does not pass the mortgage.[2] Also, that where the debt has been assigned, without the mortgage, a tender should be made to the mortgagee, not to the holder of the debt.[3] So, that the transfer of a note secured by mortgage does not, at law, assign the mortgage.[4] But where notes secured by mortgage have become the property of different persons, and there has been a foreclosure, the assignee of the mortgage holds the property and the net rents and profits, in trust for the owners of the notes, in proportion to their respective amounts. And a holder of a note may recover, in equity, his proportionate part thereof, from such assignee, who, as well as his assignor, the assignee of the mortgagee, had

[1] Per Mellen, C. J., Vose *v.* Handy, 2 Greenl. 332, 333.

[2] Smith *v.* Kelley, 27 Maine, 237; Dockray *v.* Noble, 8 Greenl. 278.

[3] Smith *v.* Kelley, 27 Maine, 237; Dockray *v.* Noble, 8 Greenl. 278.

[4] Dwinel *v.* Perley, 32 Maine, 197.

notice of the plaintiff's title, without regard to the price paid by him for the note. The mortgage and notes *create and manifest the trust*, within the Rev. Sts. ch. 91, § 31.[1] So an assignee of the mortgage and one of several notes holds in trust for all parties; — notice is implied.[2]

10. In Vermont, a parol assignment of the debt passes the mortgage,[3] even though the assignee did not know of its existence.[4] (*h*) The mortgagee holds in trust.[5] If only a part of the notes are assigned, the assignee becomes interested in the mortgage *pro ratâ*.[6] But this has been held to depend upon the intention of the parties.[7] If one of several notes is assigned, and the others are subsequently assigned with the mortgage, all the assignees still have an equal claim to the benefit of the security.[8] But if the first assignee tender payment of the other notes, and claim a transfer of the security, this is a waiver of his prior title; though he may still enforce it against the mortgagor and those claiming under him.[9] (*i*)

[1] Johnson *v.* Candage, 31 Maine, 28.
[2] Moore *v.* Ware, 38 Maine, 496.
[3] Pratt *v.* Bank, &c., 10 Verm. 294.
[4] Keyes *v.* Wood, 21 Verm. 331.
[5] Ibid.
[6] Keyes *v.* Wood, 21 Verm. 331.
[7] Langdon *v.* Keith, 9 Verm. 299.
[8] Belding *v.* Manly, 21 Verm. 550. See Bridenbecker *v.* Lowell, 32 Barb. 9.
[9] Ibid.

(*h*) On the other hand, an assignment by the mortgagee of his interest passes the right to receive payment of the notes. Indorsement of the latter is unnecessary, if *bonâ fide* sold and delivered. King *v.* Harring, 2 Aik. 33.

(*i*) The holder of the first note brings a bill against the mortgagor and his assignees, and the holder of the other notes, who has also taken a subsequent mortgage of the land. Held, upon paying to the holder the amount of the other notes, the plaintiff might enforce his lien upon the whole land, against all the defendants, as security for all the notes. Belding *v.* Manly, 21 Verm. 55.

Mortgage to A. to secure five notes. A. assigns to B. two of the notes, and a corresponding portion of the mortgage, to hold till payment thereof, B. covenanting upon payment to give up to A. "all and singular the remainder" (of the mortgaged premises). A. afterwards assigns to C. two of the other notes, and his remaining interest in the mortgaged property. B. recovers a judgment upon the mortgage, and C. brings a process for partition. Held, B. was entitled only to a portion of the premises, corresponding in value with his notes. Partition ordered accordingly. Wright *v.* Parker, 2 Aik. 212.

11. In Connecticut, an assignment of the debt passes the mortgage, so that, upon the mortgagee's death, no interest in the estate goes to his administrator.[1] So an assignment of the mortgage and subsequent delivery of the notes vest the mortgage title in the assignee.[2] (*j*) In this State, with reference to the general principle, that the mortgage is a mere incident to the debt, it has been remarked,[3] — "This doctrine, both ancient and uniform, is founded in a view of the subject, not in its form or superficies, but by penetration to the core, and regarding the contract of the parties, in its substance and intent. It was intended as a security only, and not as a sale. The equitable doctrine, concerning the rights of mortgagor and mortgagee, has gradually been naturalized in the common-law code; and by the adoption of principles long established in chancery, and tenaciously adhered to, the suitors are not driven from one bar, at increased litigation and expense, to obtain infallible relief at another." (*k*)

[1] Crosby *v.* Brownson, 2 Day, 425; acc. Lawrence *v.* Knapp, 1 Root, 248.
[2] Dudley *v.* Cadwell, 19 Conn. 218.
[3] Per Hosmer, C. J., Clark *v.* Beach, 6 Conn. 159.

(*j*) Mortgage from A. to B., to secure him for certain indorsements. Upon A.'s failure to pay the notes, B. paid them by his own notes indorsed by C., leaving A.'s notes still in the bank, where they were originally. B. also failing to pay his notes, they were satisfied by a sale of C.'s property on execution. Upon the commencement of suit against C., B. delivered to him A.'s mortgage, and assigned all his interest in the property, taking back a defeasance; but A.'s notes were not delivered to C. C. brings a bill in equity for the benefit of the security given to B. Held, the effect of the transaction was to be determined by the intention of the parties, as gathered from their situation, from the subject-matter, and the words used; all which showed a purpose to assign the notes, without which the transfer of the mortgage would be unavailing; and the bill was sustained. Bulkley *v.* Chapman, 9 Conn. 5.

(*k*) In the case of Clark *v.* Beach (6 Conn. 159. See Norwich *v.* Hubbard, 22 Conn. 587), from which these remarks are taken, it was further said by Hosmer, C. J., (who dissented from the Court, in their judgment upon that case,) with particular reference to the effect of *an entry* by the

12. In Pennsylvania, where a mortgagee transfers the obligation which the mortgage was made to secure, an entry of

mortgagee, upon the previous rights of himself and the mortgagor: — "There is nothing in the nature of this fact *per se* (*possession* by the mortgagee), that adds to the mortgagee's title, or the title of any other person. Before entry, the grantee of land, except where possession is requisite to commence a right, has title, not enlarged by subsequent occupation; as such occupation confers not any right, but merely gives the enjoyment of a right antecedent. After possession, just as before, the estate mortgaged is a pledge only; the relation of creditor and debtor exists; the equity of redemption is unimpaired; or if the law-day has not elapsed, the payment of the debt annihilates all the rights of the mortgagee. All this is true, until foreclosure is effected. Then it is, that the mutual relation of the parties becomes changed. The mortgaged premises, by a legal appropriation thereof, are lost to the mortgagor forever; and the mortgagee has become tenant in fee-simple." The same judge remarked in another case (Huntington *v.* Smith, 4 Conn. 237): — "The mortgagee, before *entry* or foreclosure, has at most a *chose in action* and a right to the possession, in order to render the mortgage available to the payment of his debt."

But the Court of that State, by a majority of its judges, seems to have adopted a view of this subject somewhat different from that above stated, which is undoubtedly the prevailing rule of the law. They say: "The mortgagee is well seised against the mortgagor, and certainly against all strangers, so as to enable him to maintain trespass or ejectment. This right of the mortgagee appears essential to the protection of the pledge; and without it, he would be without security, — his pledge would be useless." Clark *v.* Beach, 6 Conn. 151.

In the case of Clark *v.* Beach, (6 Conn. 151.) the defendant in an action of trespass justified under the license and authority of a third person, who was alleged to be "the true and lawful owner of the land," and to be "lawfully seised and possessed thereof;" and, to sustain the plea, offered in evidence a mortgage to such third person from an owner of the land. It appeared, that the mortgage had been forfeited, and possession surrendered by the mortgagor to the mortgagee before commission of the trespass; and that at that time the mortgagee was in possession. The equity of redemption, however, still remained in the mortgagor. It was held by the Court, (Hosmer, C. J., dissenting,) that the defence was sufficient. This decision rested upon the ground of lawful ownership and seisin of the mortgagee for the purposes of this case, and also upon a statute, which provided, that in cases of this nature the defendant should pay treble damages and cost, unless he should make out a title *paramount to that of the plaintiff*, the plaintiff having proved no title whatever in himself.

satisfaction by him will not discharge the mortgage in favor of a prior purchaser, as against the assignee of the obligation; but such assignee may bring an action on an exemplification of the mortgage, upon which satisfaction is indorsed. It is otherwise in case of a subsequent *bonâ fide* purchaser of the estate, having notice of the entry of satisfaction, and not of the assignment.[1] In the same State, in the case of Donley *v.* Hays,[2] it was held, that, where several bonds are secured by mortgage, a part of which are assigned by the mortgagee at different times and to different persons, and the premises are afterwards sold on an execution in favor of the mortgagee against the mortgagor; the price shall be applied to all the bonds *pro ratâ*, including those which the mortgagee himself retains; that the rule, "*qui prior in tempore, potior est in jure*," did not apply, except in case of successive charges upon the same property, whereas in this case the several bonds were distinct things; and great uncertainty and fraud might result from allowing an inquiry into the respective dates of the assignments. It was further held, that the mortgagee should have an equal right with the other bondholders, because the assignments involved no transfer of the mortgage except by implication, and no warranty, express or implied. (*l*) A mortgage made to a firm, to secure a partnership debt, will pass by an assignment of "all debts due to the firm."[3]

13. In Indiana, a deed is necessary to pass the legal title

[1] Roberts *v.* Halstead, 9 Barr, 32.
[2] 17 S. & R. 400; acc. Perry's, &c., 22 Penn. 43.
[3] Dubois' &c., 38 Penn. 231.

(*l*) From this opinion of a majority of the judges, Gibson, C. J., dissented, upon the grounds, that the assignments imposed a moral obligation upon the mortgagee, which equity would enforce, though not a legal one; that, as the debt was the principal and the mortgage an accessory, the assignment of a part of the debt was an assignment of the mortgage, not *pro ratâ*, but *pro tanto*, and the assignees purchasers of all the securities of the mortgagee, to be used by them as freely and beneficially as by him.

of the mortgagee;[1] but a sale of the note passes the mortgage in equity.[2] So a transfer of one of several notes; notwithstanding a subsequent assignment of the mortgage.[3] (*m*) In case of an assignment of one note, the note first due is to be first satisfied from the mortgage.[4] (*n*) So in Missouri,[5] the mortgage passes with the note. If there are more notes than one, the holders share proportionally in the mortgage security. But the right is purely equitable, and will be subordinate to the claim of an innocent purchaser, more especially if he has been misled by concealment of the equitable owner.[6] In Ohio, the mortgage passes with the note,

[1] Givan *v.* Tout, 7 Blackf. 210. See Clearwater *v.* Rose, 1 Blackf. 137; Blair *v.* Bass, 4 Blackf. 539.
[2] Burton *v.* Baxter, 7 Blackf. 297.
[3] Hough *v.* Osborne, 7 Ind. 140.
[4] Stanley *v.* Beatly, 4 Ind. 134.
[5] Laberge *v.* Chauvin, 2 Mis. 179.
[6] Anderson *v.* Baumgartner, 27 Mis. 80.

(*m*) In Wisconsin, where a mortgage is to secure notes for instalments, they are to have priority out of the security in the order of their maturity, whether all remain in the hands of the mortgagee, or some have been assigned. Wood *v.* Trask, 7 Wis. 566.

(*n*) A mortgagee by deed granted and transferred his interest in the mortgage and the land, with authority to the grantee to collect the debt in the mortgagee's name, to the grantee's use. Held, a bargain and sale of the land, which passed the use, and the statute transferred the possession; that the mortgagee retained the legal title to the debt, but the equitable interest vested in the grantee, and he might collect it in the mortgagee's name, for his own use. 7 Blackf. 210. Also, that the mortgagee could not maintain ejectment. Ibid.

A bill in equity for foreclosure alleged, that the mortgagee had for value received assigned and indorsed to the complainant the note, to secure which the mortgage was made, and ordered the payment to be made to him, and delivered the mortgage deed to him. Held, a sufficient description of the assignment. Slaughter *v.* Foust, 4 Blackf. 379.

Where several notes, secured by one mortgage, and falling due at different times, are assigned to different persons; those first assigned without the mortgage, and the others with the mortgage, the last falling due first, and the latter assignee having no notice of the first assignment; they shall be paid from the proceeds of the property in the order in which they fall due. State Bank *v.* Tweedy, 8 Blackf. 447.

where the mortgage is delivered.[1] So in Michigan, or, if a part only of the mortgage notes are assigned, a proportional interest in the mortgage.[2] And the assignee may foreclose.[3] So in Iowa and California.[4] And, in the former State, the assignee of the note may maintain an action upon the mortgage in his own name.[5]

14. In California, an assignee of one of two mortgage notes, with the mortgage, holds the mortgage as security *pro ratâ* for the other note previously assigned. The mortgage itself is sufficient notice to bind him. And if he discharge the mortgage, such discharge will not bind the holder of the other note.[6]

15. In Illinois, no title to the mortgage will pass by an assignment of the debt, which is not *bonâ fide* as to the debt itself. Thus certain promissory notes, secured by mortgage, were made payable to the administrator and administratrix of an estate. The latter afterwards married, and the husband obtained the notes without any assignment or indorsement upon them, and transferred them to a creditor of his own, as collateral security, the proceeds to be applied to the debt. Held, the circumstances were sufficient to put the assignee upon inquiry; that he took subject to the claims of the rightful owners, and could not maintain a bill to foreclose the mortgage.[7]

16. In Kentucky, the assignment of a note secured by mortgage carries with it the mortgage lien, which continues notwithstanding a renewal of the note or the giving of a new one to a third person.[8] (*o*) But where a mortgage is made to secure several notes, an assignment of the mortgage and some of the notes does not pass the others.[9]

[1] Paine *v.* French, 4 Ham. 318.
[2] Cooper *v.* Ulmann, Walk. Ch. 251.
[3] Martin *v.* M'Reynolds, 6 Mich. 70.
[4] Crow *v.* Vance, 4 Iowa, 434; Ord *v.* McKee, 5 Cal. 515.
[5] Ibid.
[6] Phelan *v.* Olney, 6 Cal. 478.
[7] McConnell *v.* Hodson, 2 Gilm. 640.
[8] Burdett *v.* Clay, 8 B. Monr. 287; Waller *v.* Tate, 4 Ib. 532.
[9] Stockton *v.* Johnson, 6 B. Monr. 408.

(*o*) The assignee must resort to the land before calling on the assignor. Miles *v.* Gray, 4 B. Monr. 417.

17. In Mississippi, it is held, that the mortgage passes by a transfer of the note. The assignee may foreclose the mortgage, and the mortgagee cannot release it. It has been questioned, whether, in case of several notes secured by mortgage, the mortgagee can legally stipulate with an assignee of the first, that he shall have a prior lien to the others.[1] All debts secured by mortgage, and due at the date of the decree of foreclosure, are payable *pro ratâ*, unless the mortgagee, in making an assignment, intended to give a priority. A guaranty of the note which first falls due is not sufficient to give it such priority.[2] If bonds secured by mortgage are assigned as collateral security for the assignee's acceptances, which he pays, he may foreclose the mortgage.[3] Where a mortgagee assigns a part of the notes, he may agree that the assigned notes shall be first paid from the mortgage fund, which agreement shall bind subsequent assignees of the other notes. And the agreement may be implied from the circumstances of the case, as well as express.[4] If the mortgagee is compelled to pay one of the first assigned notes as indorser, he cannot, as between him and the first assignee, claim a *pro ratâ* distribution of the proceeds of the property. As to such assignee, he does not stand as a surety; but the debt is his own, and the payment a fulfilment of his contract.[5] (*p*)

18. In Alabama, the assignment of the mortgage note or bond passes the mortgage in equity, and the assignee may

[1] Dick *v.* Mawry, 9 Sm. & M. 448; Lewis *v.* Starke, 10, 120; Henderson *v.* Herrod, Ib. 631; Terry *v.* Woods, 6, 139.

[2] Jefferson, &c. *v.* Prentiss, 29 Miss. 46.

[3] Natchez *v.* Minor, 9 Sm. & M. 544.

[4] Bank, &c. *v.* Tarleton, 23 Miss. 173.

[5] Ibid.

(*p*) Where a mortgage was made to secure several notes, which were transferred to different persons, and the mortgagee gave to the first assignee an unrecorded writing, authorizing him to use the mortgage in any manner that he himself might do, for the collection of the note; held, such assignee acquired no better title to the mortgage than the others, and, if he proceeded to foreclose, after the other notes had matured, must share with them the proceeds of suit. Henderson *v.* Herrod, 10 Sm. & M. 631.

enforce it in the name of the mortgagee; though in case of express assignment he must do it in his own name.[1] In the former case, he may proceed to foreclose in his own name in a court of equity. The mortgagee holds in trust for him.[2] In the same State it has been held, that, where a vendor of land takes several notes for the price, retaining also a lien upon the land, and assigns some of the notes, with the lien, retaining the rest; upon a sale of the property, the proceeds shall be applied to all the notes *pro ratâ*, unless the assignment expresses a contrary intent.[3] But another case decides, that, where one of several mortgage notes is assigned, and the mortgage is not sufficient security for the whole, the assignee shall have priority. If the notes are assigned to different persons, they will have priority in the order of their assignment.[4]

19. In Florida, the assignment of a mortgage must be accompanied with an assignment of the debt, in order to make the assignee *a creditor* of the mortgagor.[5] (*q*)

20. Upon the general principle, that the mortgagee is not the real *owner* of the estate, he has no power to *lease* the premises, except in case of absolute necessity.[6] Thus to a bill for reconveyance, filed by mortgagor against mortgagee, the defendant answered, that he had leased for five years, at

[1] Graham *v.* Newman, 21 Ala. 497; Emanuel *v.* Hunt, 2, 190.
[2] Center *v.* P. & M. Bank, 22 Ib. 743.
[3] M'Vay *v.* Bloodgood, 9 Por. 547.
[4] Cullum *v.* Erwin, 4 Ala. 452.
[5] Carter *v.* Bennett, 4 Florida, 283.
[6] Coote, 426. See Worster *v.* Great Falls, &c., 41 N. H. 16.

(*q*) Where five notes were made, secured by one mortgage, and three of them were assigned to A., by whom a foreclosure was had, and the land was sold, and one of the notes assigned to B., by whom, after the foreclosure, suit was brought against the mortgagor's administrator; held, where several notes are secured by one mortgage, all the mortgagees and their assignees should be before the Court before foreclosure would be decreed; and B.'s suit was dismissed without prejudice. Wilson *v.* Hayward, 2 Florida, 27.

Where a mortgage has been given to secure several notes payable at different periods, they are entitled to satisfaction from the mortgage, according to the order in which they were made payable; and this, though the holder of a note payable at a time later than the rest has taken an assignment of the mortgage. 6 Ibid. 171.

an annual rent, with a covenant that after such term the tenant might hold four years longer, and that he would reconvey, if the mortgagor would grant such additional lease. A decree at the Rolls in favor of the defendant was reversed by Lord Macclesfield on appeal, upon the ground that before foreclosure a mortgagee cannot lease to bind the mortgagor, unless from necessity, and to avoid an apparent loss.[1] Nor is a mortgagee entitled to the *remedies* of a lessor. Thus a mortgagee received seisin and possession under a conditional judgment and execution, the mortgagor agreeing to quit whenever the mortgagee should lease the premises, but not being actually ejected. The mortgagee made a written lease to a third person. Held, the latter could not maintain the process provided by the Revised Statutes (p. 104), against the mortgagor, upon his refusing to quit.[2]

21. Although not strictly an *owner*, the mortgagee has an *insurable* interest;[3](*r*) and in this connection we may properly consider the respective rights of mortgagee and mortgagor, under the various combinations of circumstances which are liable to occur in reference to insurance.

22. In the first place, there seems no reason to doubt, that these parties may validly insure, each his own interest in the same property.

[1] Hungerford *v.* Clay, 9 Mod. 1.
[2] Larned *v.* Clarke, 8 Cush. 29.
[3] See Kernochan *v.* New York, &c., 17 N. Y. 428; Vernon *v.* Smith, 5 B. & Ald. 1; Tillon *v.* Merchants, &c., 7 Barb. 374; Swift *v.* Vermont, &c., 16 Verm. 305; Fire, &c. *v.* Morrison, 11 Leigh, 354; Locke *v.* North American, &c., 13 Mass. 61; Higginson *v.* Dall, 13 Mass. 96; Delahay *v.* Memphis, &c., 8 Humph. 684; Meltenberger *v.* Beacom, 9 Barr, 198; De Bolle *v.* Pennsylvania, &c., 4 Whart. 468; Motley *v.* Manufacturers', &c., 16 Shepl. 337.

(*r*) Where one, who is only a mortgagee answers to questions proposed to him, that he is the owner of the estate, free of incumbrance; this is a misrepresentation which avoids the policy; more especially where the rules of the company require a full disclosure. And parol evidence is inadmissible, that the company had notice of the actual title. Jenkins *v.* Quincy, &c. 7 Gray, 370. It is said to have been very recently decided, that neither the subsequent payment of the mortgage, nor forgetfulness of its existence, is a sufficient answer to this defence. Mass. Sup. Jud. Court, Worcester, 1863. (See p. 258.)

23. An insurance by the mortgagee is merely an insurance of *the debt*, which accordingly ceases when the debt is paid. If a loss happens before payment, he may recover to the amount of the debt; and this although the property remains ample security for such debt, and though the loss is repaired by the mortgagor.[1] (*s*)

24. The mortgagee may, by agreement, effect insurance at the mortgagor's expense. (*t*) In such cases, the premium may be without usury added to the debt; because the mortgagor is the ultimate gainer. In case of loss before payment of the debt, the sum payable to the mortgagee is the proceeds of a security furnished by the mortgagor, and goes to diminish the debt, as in case of all collateral security. The mortgagor in fact pays the premium.[2]

[1] Carpenter *v.* Providence, &c., 16 Pet. 495; Kittredge *v.* Rockingham, &c., (N. H.) Law Rep., Dec. 1849, p. 412; King *v.* State, &c., 7 Cush. 567; Kernochan *v* New York, &c., 5 Duer, 1; Insurance Co. *v.* Woodruff, 2 Dutch. 541; Smith *v.* Columbian, &c., 5 Harr. (Penn.) 253; Foster *v.* Equitable, &c., 2 Gray, 216.

[2] 7 Cush. 5.

(*s*) If the mortgagee, without any agreement with the mortgagor, insure his own interest; the mortgagor cannot claim to have the sum recovered under such insurance deducted from the mortgagee's charge for repairs. White *v.* Brown, 2 Cush. 412.

In New York, where insurance is effected by a mortgagee as such, the payment of a loss does not discharge the mortgage debt in whole or in part, but operates in equity, and, since the code, at law, as a transfer of the debt and all its securities to the insurer. Kernochan *v.* New York, &c. 5 Duer, 1. It is held that the insurer of a mortgagee, upon payment of the loss, is subrogated to all his rights. That, in a suit on a policy, the rights of the parties as to subrogation are to be determined as at the commencement of the suit. And that a creditor, who holds several mortgage and other securities for the same debt, becomes a trustee for insurers, who pay a loss on the mortgaged property, as to all his securities, to the amount paid. Insurance Co. *v.* Woodruff, 2 Dutch. 541.

(*t*) In an action by the mortgagee, parol evidence of such agreement is admissible, as not varying a written contract, and as material, in showing that the mortgagor was entitled to have the amount of the policy applied to the debt, and that therefore the insurers have no right of subrogation in respect of the mortgage. Kernochan *v.* New York, &c. 17 N. Y. 428. Whether the insurers had notice of the agreement or not, the insurance is of the property, and not the debt, though it was through the debt that the mortgagee derived his insurable interest. Ibid.

25. But it is truly said by Judge Story,[1] referring of course to cases where the insurance is not effected expressly for the mortgagee's benefit: — "We know of no principle of law or of equity, by which a mortgagee has a right to claim the benefit of a policy underwritten for the mortgagor on the mortgaged property, in case of a loss by fire. It is not attached or an incident to his mortgage. It is strictly a personal contract for the benefit of the mortgagor, to which the mortgagee has no more title than any other creditor."[2] And the clause 'for whom it may concern,' has been held to make no difference in this respect.[3] (*u*)

26. Again, — subject of course to any express rule of the company to the contrary, — the mortgagor may obtain insurance, and may recover the full amount of his policy, notwithstanding the incumbrance. So it is held, that he may insure to the full value of the property.[4] And even though his equity of redemption has been seized on execution. Nor will a sale on execution divest his insurable interest.[5]

27. And the mortgagor may effect insurance, payable to the mortgagee, which is an insurance of the mortgagor's interest, with an irrevocable power of attorney or assignment to the mortgagee, as further security, to receive the insurance. (*v*) In such case, the whole amount must be paid,

[1] Columbia, &c. *v.* Lawrence, 10 Pet. 512; acc. Lynch *v.* Dalzell, 4 Bro. Parl. 431.

[2] Acc. Nichols *v.* Baxter, 5 R. I. 491.

[3] McDonald *v.* Black, 20 Ohio, 185; Vandegraaff *v.* Medlock, 3 Port. 389; Carter *v.* New York, &c. 8 Paige, 437.

[4] Carpenter *v.* Providence, &c., 16 Pet. 495; Kittredge *v.* Rockingham, &c. (N. H.) Law Rep., Dec. 1849, p. 412.

[5] Strong *v.* Manufacturers', &c. 10 Pick. 41.

(*u*) The same principle has been applied, as between a mortgagor and an execution purchaser of his interest. Cushing *v.* Thompson, 4 Red. 496.

(*v*) In such case, the mortgagee is not an assignee of the policy, but, in reference to the liability of the insurers, is bound by any subsequent act of the mortgagor. Grosvenor *v.* Atlantic, &c., 17 N. Y. 391; Loring *v.* Manufacturers', &c., 8 Gray, 28. But, where a policy is *assigned* to the mortgagee, he may recover in case of loss, notwithstanding a violation of the conditions of the policy by the mortgagor. Grosvenor *v.* Atlantic, &c., 5 Duer, 517.

though the mortgage debt has been extinguished. The loss is then received by the mortgagee from a fund placed in his

---

Where an assignment of a policy is made to a mortgagee, with the knowledge and assent of the company, the assignor ceases to have the power to defeat the rights of the assignee. He cannot discharge an action on it, commenced in his own name; and a payment to him would be of no avail. Pollard *v.* Somerset, &c., 42 Maine, 221. See Carter *v.* N. Y. &c., 4 Paige, 437. But the action must be in the name of the assignor, unless there be an express promise to the assignee. Ibid.

An assignment of a policy, issued by a mutual fire insurance company, made, with the assent of the insurers, to a mortgagee, on his written promise to pay all future assessments, and that the property shall continue subject to the same lien for the payment of assessments as before, constitutes a new contract between the mortgagee and the insurers, which is not affected by the mortgagor's subsequent alienation of the equity of redemption, nor by his grantee's obtaining subsequent insurance thereon. Foster *v.* Equitable, &c., 2 Gray, 216. See Peabody *v.* Washington, &c., 20 Barb. 339.

If the mortgagor covenants to keep the premises insured, the mortgagee has an equitable lien on the money due by the policy. Carter *v.* New York, &c., 4 Paige, 437; Carter *v.* Rockett, 8 Paige, 438. If the covenant be, to rebuild with the money recovered for insurance, the mortgagee has such lien for any amount which cannot be collected by foreclosure and sale. Thomas *v.* Van Kaff, 6 Gill & J. 372.

Numerous cases have arisen, in construction of the almost invariable provision in policies of insurance, that any concealment or misrepresentation in reference to the title shall avoid the policy. (See p. 255.) A party is responsible for the misrepresentation of his agent, made in good faith, in reference to incumbrances. Smith *v.* Empire, &c., 25 Barb. 497.

An unrecorded mortgage, though made by a prior owner, is an *incumbrance*, within the meaning of an answer to the question proposed by an insurance company, whether the property is incumbered. Hutchins *v.* The Cleveland, &c., 11 Ohio St. 477; Packard *v.* Agawam, &c., 2 Gray, 334.

A policy upon real and personal estate, accompanied by only one premium note, stipulated, that, if the application did not contain a full exposition of all the facts in regard to the title, &c., the policy should be void. In answer to an inquiry "whether the property was incumbered, to whom, and what amount," the application stated "About $4,000 to A. B." In fact, there was then a mortgage on the whole property, to A. B. for $3,600, and another on the real estate to J. P. for $1,100. Held, as the contract was entire, the lien on the whole property was affected by the misrepresentation, and the policy was wholly void. Brown *v.* People's, &c., 11 Cush. 280;

hands for a special purpose, which has been accomplished; it is the proceeds of an insurance of the mortgagor's interest,

acc. Smith *v.* Empire, &c., 25 Barb. 497; Friesmuth *v.* Agawam, &c., 10 Cush. 588. So, where the answer was, "about $3,000," when there was a mortgage for $4,000; held, the misrepresentation avoided the policy. Hayward *v.* New England, &c., 10 Cush. 444.

A statement, that there are no incumbrances but a particular mortgage, is a warranty against other incumbrances; and such warranty is broken, and the policy avoided, by the existence of another mortgage. Smith *v.* Empire, &c. 25 Barb. 497. Nor does it make any difference that there was a mortgage prior to the one disclosed, but the second mortgagee was to apply the payments to such mortgage, and had placed his notes and mortgage in A.'s hands for that purpose, and that the second mortgage was afterwards increased to the amount of the first. Battles *v.* York, &c., 41 Maine, 208.

An application for insurance in a mutual fire insurance company stipulated, that the statements therein were correct "so far as regards the risk." Another clause in the application, to which the policy was expressly made subject, provided, that the misrepresentation of material facts would destroy any claim for a loss. The application contained an untrue representation that the property was unincumbered. Held, the policy was void, and the express covenant as to the "risk" did not limit the assured's responsibility for other material misrepresentations. Friesmuth *v.* Agawam, &c., 10 Cush. 588. A failure to disclose a mortgage avoids the policy, although a jury find that the misrepresentation was not material to the risk, and there is evidence tending to show, that the mortgage was disclosed to the agent of the company by whom the application was filled up. Bowditch, &c. *v.* Winslow, 3 Gray, 415.

The plaintiff, in an application for insurance, called the property "his," but stated it was incumbered. Two mortgages then existed on the estate, given by a former owner, whose equity of redemption had been sold on execution, before the plaintiff acquired the estate. Held, as the plaintiff had a legal right to redeem all these incumbrances, there was no misrepresentation of title. Buffum *v.* Bowditch, &c., 10 Cush. 540.

If a representation as to incumbrances is untrue, but not fraudulent, and the agent of the underwriter knows the facts, and writes the statement as made from his own knowledge, but fails to give it truly; such misrepresentation will not avoid the policy, although the statement is adopted and signed by the insured. Hartford, &c. *v.* Harmer, 2 Ohio, (N. S.) 452.

Where it was agreed between the mortgagors and the mortgagee that the latter, as such, should insure the premises for their benefit and at their ex-

by a contract with him, on a consideration made by him, and assigned to the mortgagee. Of course the mortgagee receives it to the use of, and accounts for it with the mortgagor. If the debt has not been paid, the money goes to pay it *pro tanto*, and is therefore so applied to the mortgagor's benefit.[1]

28. The foregoing points are further illustrated by a late case in Massachusetts. Insurance was effected upon mortgaged real estate, payable to the mortgagee, in a company, the by-laws of which provided, that no mortgaged estate should be deemed *alienated*, so as to avoid the policy, until foreclosure; and any policy, payable to a mortgagee, should continue so payable, notwithstanding a subsequent alienation of the estate. A third person purchased the equity of redemption, and took an assignment of the mortgage and the policy, after which a loss accrued. Held, the mortgage was merged in the fee, and no action would lie on the policy.[2] Shaw, C. J., says:[3] — "The insurance was not upon the interest of Macomber (the mortgagee); but the undertaking to pay him was a collateral and derivative contract, growing out of the principal contract with the assured, by which the company stipulated to pay to the appointee of the assured, instead of paying to the assured himself. The ordinary effect of such a contract between the three parties is, that if the assured, whose property and interest alone are covered, should aliene before a fire, he would sustain no damage, there would be no loss, for which the insurers would be responsible, and therefore the contingency, upon which the

[1] King *v.* State, &c. 7 Cush. 5–7.
[2] Macomber *v.* Mutual, &c., 8 Cush. 133. See Bragg *v.* N. E. &c., 5 Fost. 289.
[3] Macomber *v.* Mutual, &c., 8 Cush. 135.

---

pense, he holding the policy as security; in an action upon the policy, a new trial was granted, for the purpose of submitting to the jury the question, whether the omission of the mortgagee to make known such agreement to the insurance company was, or was not, a material concealment avoiding the policy. Kernochan *v.* New York, &c., 5 Duer, 1. See, further, Bowditch, &c. *v.* Winslow, 8 Gray, 38; Allen *v.* Hudson, &c., 19 Barb. 442; Wilbur *v.* Bowditch, &c., 10 Cush. 446; Jackson *v.* Farmers', &c., 5 Gray, 52.

appointee would have a right to claim, could not happen. In general, the assured must have an insurable interest, at the time of the damage by fire as well as at the time of effecting the policy. But the policy and by-laws contain an express stipulation, that no mortgaged estate shall be deemed to be alienated, until the mortgage shall be foreclosed." So also, that a mortgagee may recover, notwithstanding an alienation. Hence the alienation, in this case, would be no bar to the action. But the Court further held, that, "although the insurance is not upon the interest of the mortgagee, and the undertaking — to pay the mortgagee — collateral and derivative, yet the stipulation is so made, because he is mortgagee, and for the better security of the mortgage debt. If, therefore, the mortgage is paid, foreclosed, or otherwise discharged and extinguished, such separate and collateral promise to pay the mortgagee would be determined."

28*a*. A late case in New York,[1] (*w*) the report of which has

[1] Court of Appeals, New York City, Grosvenor *v.* Atlantic, &c.

(*w*) "HARRIS, J. — The contract of insurance is a contract of indemnity. To sustain an action upon such a contract, it must appear that the party insured has sustained a loss. This involves the necessity of an insurable interest at the time of the alleged loss; without such interest the party insured cannot be indemnified.

"In this case the contract was between the defendants and McCarty. The agreement was to insure 'Eugene W. McCarty against loss or damage by fire to the amount of $7,000, on his three story brick dwelling-house.' But after the contract was made, and before the alleged loss, McCarty had sold and conveyed the property insured. At the time of the fire he had no insurable interest; of course he has no claim for indemnity. No action, therefore, could be maintained upon the policy of McCarty.

"But, at the time the insurance was effected, the plaintiff in this action, Grosvenor, was the holder of a mortgage upon the premises insured. As such mortgagee, he, too, had an insurable interest. The extent of that interest was the amount of his debt. To that extent he might have contracted with the defendants to indemnify him against loss by fire. The payment of his debt would as completely terminate the contract to insure, as would the alienation of the property when the contract is made with the owners.

"The important inquiry in this case is, to which of these classes does the

been only in a newspaper, contains an abstract and revision of several previous decisions in that State. The point directly

---

contract in question belong. The action is brought by the plaintiff as mortgagee; the contract was made with McCarty, the mortgagor. But the policy provides that, in case of loss, such loss should be payable to the plaintiff. What is the legal effect of this provision? Without it, the plaintiff could have no claim against the defendants for indemnity. Is this provision to be regarded as an appointment of the plaintiff to receive any money which might become due from the insurers, by reason of any loss sustained by the mortgagor; or has it the effect to render the policy, which would otherwise be a contract to indemnify the mortgagor against loss, a contract to indemnify the mortgagee? A determination of this question will also determine the rights of the parties to the action.

"Were it not for one or two decisions in this State bearing upon the question, I should have little difficulty in pronouncing in favor of the former of these propositions. It seems to me to be very clear that it was the intention of all the parties that the interest of the mortgagor, and not that of the mortgagee, should be insured. It is stated in the policy that the property insured is the property of McCarty, and that he is the person insured. McCarty paid the premium — he made the contract. His interest as owner, and not that of the plaintiff as mortgagee, was the subject of the insurance. The plaintiff was merely the appointee of the party insured to receive the money which might become due him from the insurers upon the contract. The provision in the policy in this respect had no more effect upon the contract itself than it would if it had been provided that the loss for which the insurers should become liable should be deposited in a specified bank to the credit of the party insured.

"Suppose that the plaintiff, although described in the policy as a mortgagee, had in fact held no mortgage, could it be pretended that the defendants might have avoided the policy on the ground that the plaintiff had no insurable interest? Or, suppose again, that after the contract had been made, the mortgage had been paid, could it be claimed that the contract to insure had also ceased? I presume none will deny that, in either case, the contract would have continued in force for the benefit of the owner of the property insured. If so, it must have been because the interest of the mortgagor, and not that of the mortgagee, was the thing insured. I agree with the Court below, that 'there is nothing in the language of the policy on which the Court can adjudge that, in legal effect, it is a contract insuring the interest of the mortgagee, as such, except in the provision which declares that the loss, if any, which occurs under the contract insuring the mortgagor's interest, shall be payable to the mortgagee. That provision merely

decided is, that a policy of insurance, effected by a mortgagor in his own name, but payable in case of loss to the

---

designates a person to whom such loss is to be paid, and shows that he is a person who may have an interest in its being so paid.'

"The undertaking to pay the plaintiff was an undertaking collateral to and dependent upon the principal undertaking to insure the mortgagor. The effect of it was, that the defendants agreed that whenever any money should become due to the mortgagor upon the contract of insurance, they would, instead of paying it to the mortgagor himself, pay it to the plaintiff. The mortgagor must sustain a loss for which the insurers were liable before the party appointed to receive the money would have a right to claim it. It is the damage sustained by the party insured, and not by the party appointed to receive payment, that is recoverable from the insurers. See Macomber *v.* The Cambridge Mutual Fire Insurance Co., 8 Cush. 133. The insurance being upon the interest of the mortgagor, and he having parted with that interest before the fire, no loss was sustained by him, and, of course, none was recoverable by his assignee or appointee. The right of such a party being wholly derivative, cannot exceed the right of the party under whom he claims. See also Carpenter *v.* The Providence Washington Insurance Co., 16 Peters, 495; Foster *v.* The Equitable Fire Ins. Co., 2 Gray, 216.

"I agree with the learned judges who delivered opinions upon the decision of this case in the court below, that there is no just ground for discrimination between this case and that of an assignment of the policy to a mortgagee, to be held by him as collateral security for his debt, with the consent of the insurer. In either case the insurance is upon the interest of the mortgagor. The terms and conditions upon which indemnity may be claimed are agreed upon, and then the original parties further agree that when, by the terms and conditions of the interest, the insurers shall become liable by reason of a loss sustained by the party insured, the money shall be paid, not to the party who has sustained the loss, but to his appointee or assignee, for his benefit. Such an appointment or assignment ought not to be construed so as to vary, in any respect, the liabilities of the insurers upon their original contract. It is certainly true, as was said by Mr. Justice Woodruff, that 'when applied to other agreements for the payment of money, an assignment does no more than direct to whom it shall be paid when it shall become due.'

"The case of The Traders' Insurance Company *v.* Robert, 9 Wend. 404, was, in my judgment, erroneously decided, and, unless by subsequent recognition or acquiescence it has become so securely imbedded in the law of this State, that it may not be disturbed, it ought not to be followed. It

mortgagee, is (in the absence of a provision in the policy to the contrary) avoided, by a subsequent sale of the equity

---

was a condition of the policy in that case that it should cease, if the assured should effect a further insurance upon the property, and should omit to give notice of such further insurance within a reasonable time. The policy in question was assigned to a mortgagee with the consent of the insurers. After this assignment the party insured effected a further insurance with another company, and neglected to give the requisite notice. It was held, that the action being brought by the assignee of the policy, though in the name of his assignor, no act of the latter, after the assignment, could be allowed to prejudice the rights of the former. The argument by which this result was reached, seems to me to have been singularly illogical and inconclusive. Indeed, it depends entirely upon the misapplication of a very familiar principle. 'Had the nominal plaintiff executed a release to the Insurance Company,' says the Court, 'it would have no effect upon the rights of the assignee; and if he could not directly discharge the right of action which he had assigned, surely he cannot do it indirectly. The fact, therefore, of his having effected a subsequent insurance upon the same premises, can have no influence upon the rights of the real plaintiff in this suit.' It is quite obvious, I think, that the learned Judge who delivered the opinion, entirely failed to discriminate between acts done for the purpose of discharging the liability of the insurers upon their contract, and acts which, by the terms of the contract, were necessary in order to continue such liability. All will agree in the soundness of the premises upon which the argument is founded. It is true that the assignor of a right in action cannot indirectly, any more than he can directly, do anything which will discharge the liability of the contracting party to his assignee. But it is equally true, that when such liability is by the terms of the contract made to depend upon the performance of an act by the assignor, an assignment of the contract will not operate to dispense with the performance of the act as a condition of liability. It had been stipulated between the contracting parties, that if the assured should effect a further insurance, and should omit to give notice to the insurers of such further insurance, the whole contract should be at an end. This was the condition upon which the insurers were to continue liable. It was no less a condition after the assignment than before. The assignee took the contract with knowledge that it might be avoided by a failure to perform this condition. The inference of the Court, therefore, that, because the assignor of a right in action cannot directly or indirectly release such right of action to the prejudice of his assignee, the fact, that, subsequent to the assignment of the policy, the assignee effected a further

of redemption by the mortgagor. But, in New Hampshire, where application by a mortgagor for an insurance stated,

---

assurance, without giving notice as required by the policy, would have no influence upon the rights of the assignee, is not justified.

"Again, it is said by the Court, in The Traders' Insurance Company *v.* Robert, that 'after the assignment of the policy to Bolton, the mortgagee, Robert, in whose name it was originally taken, had no interest in it, and that the rights of the parties were the same as if the policy had been given to Bolton.' This, too, is an obvious error. Robert was as much interested in the policy after he had assigned it to his creditor as before. The money for which the insurers might become liable was to be applied to his use. The only effect of the assignment was to make a specific appropriation of the money beforehand to the payment of a specific debt. The insurance was for the benefit of the owner of the property by whom it was obtained; but it was convenient for him, as in the case now in hand, to appoint the particular creditor who should receive the money in case of a loss. The real interest of the party insured remained unchanged.

"From the judgment of the Supreme Court in The Traders' Insurance Company *v.* Robert, there was no appeal. The decision was suffered to become the law of the case. There stood upon the records of the court an absolute, unimpeachable, and irrecoverable judgment in the favor of Robert against the Insurance Company. The legal title to the judgment was in Robert. A contingent equitable interest was vested in Bolton, the assignee of the policy. That interest was extinguished by the payment of the debt, to secure which it had been assigned. Thus the entire equitable as well as legal right to the judgment became invested in Robert, the plaintiff. Under these circumstances, the Supreme Court, as though aware of the injustice which its decision was likely to work out, made an order, on motion of the defendants on the judgment, staying all further proceedings thereon, thus, practically, reversing their own judgment in the case. This order was reversed by the Court for the Correction of Errors, and, in my judgment, very properly. The decision was put upon the ground, that, as a valid judgment had been obtained upon the policy, the payment by Robert of the debt to Bolton, for the security of which the policy had been assigned, 'had no other effect than to bring back to him that interest in the policy which he had assigned, and, of course, the interest also in the judgment which had been obtained upon the policy.' See Robert *v.* The Traders' Insurance Company, 17 Wend. 631.

"Were the question left here, I should have little hesitation in saying that the judgment of this Court ought not to be controlled by the decision of The Traders' Insurance Company *v.* Robert. But the same question was before

that the property was mortgaged, and the insurance money to be paid to the mortgagee; and it was so entered on the

---

this court in Tillou *v.* The Kingston Mutual Insurance Company, Seld. 405, and was disposed of in a similar way. In that case the insurance had been effected by three partners, and the policy had been assigned to a mortgagee of the premises to secure his debt. Afterwards, one of the partners sold out and released to his copartners his interest in the property insured. A loss having occurred, an action was brought upon the policy in the name of all three of the partners. The action was defended on the ground that the policy had been rendered void by the alienation. The Supreme Court held, that the transfer of the interest of one partner to his copartners was not such an alienation of the property as would avoid the policy. Judgment was accordingly rendered against the company for the full amount of the loss. The case being brought into this court, upon appeal, it was held here, upon the authority of Murdoch *v.* The Chenango County Mutual Insurance Company, 2 Coms. 210, that the plaintiffs could not recover for their own benefit, on the ground that one of the plaintiffs had no interest in the action.

"The question now before the Court was decided entirely upon the authority of Robert *v.* The Traders' Insurance Company, and, I think I may be allowed to add, without much consideration. The learned judge who pronounced the opinion of the court, though he had been the successful counsel in the case of Robert *v.* The Traders' Insurance Company, evidently misapprehended the value of that case as an authority. For he says, after stating the point decided by the Supreme Court, that 'the case afterwards came, in a different form, before the Court for the Correction of Errors, and that Court recognized, approved, and substantially affirmed the judgment.' In this I think he was mistaken. I have already noticed the circumstances under which the case came before the Court of Errors, and shown that the question now under consideration had already passed beyond the reach of that court. Had it not been so, the report of the case furnished strong ground for the belief that the result would have been different.

"The learned judge, further to sustain the authority of Robert *v.* The Traders' Insurance Company, and to show that the question ought to be regarded as closed against further consideration, proceeded to say, that the case had already been twice noticed by this court, and each time with approbation. In support of this statement, he refers to Conover *v.* The Mutual Insurance Company of Albany, Comst. 293, and Murdoch *v.* The Chenango County Mutual Insurance Company, above cited. In the former of these cases, Judge S. A. Johnson, in delivering the opinion of the court, says:— 'We are not called upon to decide whether the absolute alienation by Con-

policy; and the mortgagee signed the premium note with the mortgagor, to whom the policy was issued: the mortgage being afterwards foreclosed without any action on the part of the mortgagor, held, not such an alienation of the property

over after the assignment of the policy, is a good defence. The point was not raised on the trial. But if it were, I do not see how the assignee could be affected by it.' He then cites The Traders' Insurance Company *v.* Robert, 9 Wend. 404. Such a notice of an authority, it seems to me, can add but little to its judicial efficacy. In the other case, the approbation is still more faint. Indeed, I construe it into positive disapprobation. Judge Cady, who alone alluded to this authority, says: — 'It may well be doubted whether the court in that case did not go too far in order to protect the assignee.'

"Thus the question stands upon authority. Tillou *v.* The Kingston Mutual Insurance Company contains the only adjudication upon the point in this court. Of that case, it is not too much to say, that it was decided without much examination, the court relying chiefly upon the authority of Robert *v.* The Traders' Insurance Company. The value of that case, as a precedent, was, as I have attempted to show, entirely over-estimated. Believing, as I do, that it was decided upon mistaken views of the law applicable to the question involved, and that the decision of the Supreme Court never had the sanction of the Court for the Correction of Errors, and that the case in this court was determined upon a misapprehension of what had before been adjudicated, I regard the question as yet open for the consideration of this court.'

"Upon the merits of the question I have already sufficiently expressed the convictions of my own judgment. The defendants contracted with McCarty, and not the plaintiff. They agreed upon the performance of certain conditions, to pay for him to the plaintiff certain money. Some of these conditions were positive in their character, others negative. Certain things were to be done by the assured, and other things were not to be done. If all these conditions were performed, then, if a loss occurred, the defendants agreed to indemnify him against that loss to the extent specified in the policy, and he appointed the plaintiff, his creditor, to receive from the defendants the amount for which they were contingently liable. The terms of the contract have never been waived, relaxed, or modified. The defendants have shown an express violation of one or more of the conditions upon which their liability was to depend. And yet it has been adjudged — although it is evident that it has been done with reluctance, and against the better judgment of the court making the decision — that the proof of these violations constituted no defence to the action. The judgment should be reversed and a new trial granted, with costs to abide the event."

as to defeat the policy, and that an action might be maintained in the name of the mortgagor.[1]

29. Where a mortgagor covenanted with the mortgagee, that he would keep the premises insured during the continuance of the lien of the mortgage, and in case of loss that the amount received upon the policy should be applied to the rebuilding of the property insured; it was held, that the mortgagee had an equitable lien upon the fund received by the mortgagor under the policy, to satisfy such balance of the mortgage debt, as could not be collected upon a foreclosure and sale of the mortgaged premises.[2]

30. If the mortgagor either expressly or impliedly agree to insure for the benefit of the mortgagee, the latter has an equitable lien upon the policy, whether prior or subsequent to the mortgage, and notwithstanding a further stipulation, that, in default of such insurance, the mortgagee may insure, at the mortgagor's expense. And the mortgagee's lien is valid as against the company, and an assignee, both having notice. Equity will not in such case enjoin a suit brought by the assignee, but allow it to proceed to judgment, merely enjoining payment to the assignee, and authorizing the mortgagee to appear as a party. If pending the suit the mortgagee sell the estate under a power of sale, and purchase it in the name of a third person; the Court will enforce the lien upon the policy, only on condition of the mortgagee's allowing a redemption.[3]

31. In case of insurance by a mutual insurance company, it is not sufficient to enable a mortgagee to recover upon the policy, that in the application the property is described as *incumbered*, and the loss made payable to him, more especially if the sum insured exceeds the amount of the mortgage. In such case, the insurance is upon the property of the mortgagor. He gives the deposit note and becomes a

[1] Bragg *v.* New England, &c., 5 Fost. 289.

[2] Thomas *v.* Van Kapliff, 6 Gill. & J. 372. See Vernon *v.* Smith, 5 B. & A. 1.

[3] Nichols *v.* Baxter, 5 R. I. 491.

member of the company, and the contract is made with him; while the mortgagee is not insured, and does not become a member.[1]

32. In assumpsit on a policy of insurance, it appeared that the plaintiff, as mortgagee, insured his interest in his own name, and paid the premium. The defendants (the corporation) admitted the loss, and were ready to pay it, upon the plaintiff's assigning to them his interest in the property. Held, as there was no privity between the defendants and the mortgagor, and the plaintiff had insured for himself and in his own name, he had a claim to the full amount of the policy, without assigning or relinquishing his debt.[2] (*x*)

[1] Kittredge *v.* Rockingham, &c. (N. H.) Law Rep. Dec. 1849, p. 412.

[2] King *v.* State Mutual, &c., (Mass.) Law Rep. June, 1851, p. 88; 7 Cush. 1, 8, 9, 10. See 2 Phill. Ins. 419.

(*x*) In this case, the Court laid down the further doctrine, that the mortgagee might subsequently claim the full amount of his debt from the mortgagor; the contracts between the mortgagee and mortgagor, and between the mortgagee and the insurers, being alike valid, and wholly distinct from, and independent of each other; the debtor paying no more than he originally received, and the insurers only the amount of a voluntary risk, for which they received the premium established by themselves; and the policy not being liable to the objections against wager policies. The Court enter into an elaborate examination of prior decisions upon this subject, and dissent from the doctrine laid down in Carpenter *v.* Providence, &c., 16 Pet. 495, (*supra*, § 26,) that, if the mortgagee recover the amount of his debt from the insurers, they may claim an assignment of the debt and enforce it against the mortgagor.

It has been recently held in Maine, that insurance money, received by the mortgagee, must be accounted for like rents and profits. And if several notes, payable at different times, were secured by the mortgage, and have become overdue, such money is to be appropriated, first to the interest on all the notes, and then to the principal of the notes, in the order in which they fall due. Larrabee *v.* Lumbert, 32 Maine, 97. In the same State, by a late statute, where a mortgagor effects insurance upon the property, with his written consent, the loss may be paid to the mortgagee; if he does not thus consent, a trustee process lies, and a payment will be available *pro*

33. A lessee, who had covenanted to insure against fire in the joint names of himself and his lessor, with a proviso that the policy moneys should be expended in reinstating the premises, assigned them by way of mortgage, with a power of sale, under which the mortgagee sold. The mortgage did not refer to the policy. The premises were partially burned, and reinstated by the mortgagee. On a claim filed by the mortgagee and his vendee, the mortgagor was decreed to deliver up the policy, and join with the lessor in signing the receipt to the insurance office, to enable the mortgagee to receive the amount of the loss.[1]

34. A lessee in possession has no lien as against his mortgagee, on the policy moneys, for repairs made by him.[2]

35. A mortgagor assigned his policy of insurance to the mortgagee; and a suit was afterwards brought upon it in the name of the former, but for the use of the latter, and judgment recovered. The judgment remaining unsatisfied, the mortgagor paid the mortgage debt by coercion, to avoid foreclosure. Held, he might still recover the amount of the judgment.[3]

[1] Garden *v.* Ingam, 23 Eng. Law & Eq. 408.
[2] Ibid.
[3] Robert *v.* Traders', &c. 17 Wend. 631.

---

tanto. Different mortgages have claims according to priority. Any insurance by the mortgagee will be void, if he claims under this act, unless the insurer of the mortgagor consent. St. 1844, 97, 98.

The owner of an estate insured by a mutual fire insurance company mortgaged the estate, and, at the same time, with the assent of the insurers, transferred the policy to the mortgagee by an assignment, which was absolute in terms and expressed to be for a valuable consideration, but intended only as a security for the mortgage debt. The mortgagee afterwards assigned the mortgage and the debt, with the policy, by an absolute assignment, assented to by the insurers, and for a valuable consideration. The debt having been subsequently paid to the assignee, by an assignee of the mortgagor, and the mortgage thereupon discharged; and the assignee of the mortgagee, after the expiration of the policy, having received the return premium thereon; held, although he might receive it as attorney of the mortgagor, he could not retain it against the mortgagor, to whom he was liable therefor in an action of assumpsit. Felton *v.* Brooks, 4 Cush. 203.

36. Where a life policy is assigned to the mortgagee, in trust to receive the proceeds; he cannot have a decree to sell it, but may have one for foreclosure, and still retain the policy.[1]

37. Although, as above stated, a mortgage in most respects is treated as a mere security accompanying the debt; yet the assignment of a mortgage is held to be the *conveyance of an estate*, and not the mere *transfer of a security*. Hence the assignee must bring an action, if at all, in his own name. And a suit to foreclose cannot be maintained in the name of the mortgagee, though he have a power of attorney from the assignee.[2] In delivering the opinion of the Court, Parsons, C. J., distinguishes this case from that in which a disseisee makes a deed of the land, and afterwards brings a suit to recover it. In such case, the conveyance from the plaintiff is no bar to the action, because the disseisin prevented its having any legal operation. But the possession of a mortgagor is no disseisin of the mortgagee, and his alienation is not the assignment of a chose in action, but a transfer of the legal estate, subject to a condition. He further remarks, that a contrary rule would involve great inconvenience, because the assignee, after recovering a judgment in the name of the mortgagee or his representative, if deceased, might still find it difficult to perfect the legal title in himself. Nor is it any objection to such suit, that judgment has been recovered upon the bond secured by the mortgage, and assigned with it, in the name of the assignor, but not satisfied. (*y*)

[1] Dyson *v.* Morris, 1 Hare, 413.
[2] Gould *v.* Newman, 6 Mass. 239. See Given *v.* Doe, 7 Blackf. 210; Aiken *v.* Skilburn, 27 Maine, 252.

(*y*) It has been held in Massachusetts, that disseisin of the mortgagor, subsequent to the mortgage, is also a disseisin of the mortgagee; and, while it continues, the latter cannot make a valid transfer of the mortgage. Poignard *v.* Smith, 8 Pick. 272. But in Vermont, in Converse *v.* Searls, 10 Verm. 578, (see Converse *v.* Cook, 8 Verm. 164,) it was held, that a mortgage may

38. The doctrines above stated, as to the nature of the mortgagee's title, have been settled more perhaps upon the authority of Lord Mansfield's decision in the case of *Martin* v. *Mowlin*, than any other single case. This decision has consequently been often commented upon, and sometimes not with entire approbation.

39. In the case of Parsons *v.* Welles,[1] the following very lucid and forcible remarks were made by Mr. Justice Wilde: — "It cannot be denied, that these principles and rules of the courts of equity have had a favorable operation in the administration of justice, and have afforded relief where, by the strict principles of the common law, the mortgagor was without remedy. They are conformable to the spirit of the mortgage contract, and it is not surprising that they should have gained some footing in the courts of common law. It may be doubted, however, whether in some particulars they have not been adopted to an extent, inconsistent with the established rules of the common law." The learned Judge then quotes the above-cited remarks of Lord Mansfield, in the case of Martin *v.* Mowlin, and proceeds as follows: — "No authorities are cited in support of these remarks, and it seems to me extremely difficult to reconcile some of them with well-established principles of law, or with the true intention of the statute of frauds. Judge Trowbridge was of opinion, that they were accompanied with some restrictions,

[1] 17 Mass. 423, 425. See Young *v.* Miller, 6 Gray, 154, 155.

---

be validly assigned, though a third person is at the time in possession, claiming adversely to the mortgagor. The Court say, the possession of neither party could prevent the other from transferring his interest. While the right of redemption continues, the mortgagee's interest is but collateral security, and an incident to the debt, which is the main subject of assignment. It is manifestly foreign to the purpose of the statute (to prevent fraudulent speculations, &c.) to restrain the transfer of such a debt; and though the legal title may not pass without a formal conveyance, it is but the execution of a trust, which a court of equity will imply in favor of the assignee of the debt.

which the reporter omitted to notice; because he acknowledges in his preface that he did not always take down the restrictions with which the speaker might qualify a proposition, to guard against its being understood universally, or in too large a sense. See 8 Mass. Rep. 558. This appears to me probable, for it is impossible, as it seems to me, to suppose that Lord Mansfield meant to assert that 'the estate in the land is the same thing as the money due upon it,' without some qualification of the expression. This would confound all our notions, and break down every distinction between real and personal estate; between a title in land and choses in action; between mortgages in fee and mortgages for a term; and between mortgages of land and mortgages of goods. Probably Lord Mansfield intended to say nothing more, than that the estate of the mortgagee is worth no more than the debt, and is dependent upon it; that the discharge of the debt, at the time stipulated for payment, would defeat the mortgagee's estate; and even payment afterwards would have the same effect, by the aid of the court of chancery, or without such aid, by virtue of the statute of 7 Geo. II., ch. 20, which provides that the mortgagee shall maintain no ejectment, after payment or tender by the mortgagor, of principal, interest, and costs. All this would be true, and in some measure justify the expression imputed to Lord Mansfield; which, without some such restriction or qualification, cannot, I think, be held for law. Nor can it be true, as Judge Trowbridge has shown, by very cogent arguments, that 'the assignment of the debt will draw the land after it, as a consequence,' to every purpose. It can only be so by the aid of a court of equity. In a court of equity, the debt is the principal, and the mortgage is the accessory. And it is there held, that as the mortgagee holds the estate in trust for the mortgagor, so when the debt is assigned, he becomes a trustee for the benefit of the person having an interest in the debt. *Omne principale trahit ad se accessorium.* This too was one of the grounds suggested by Judge Spencer for the opinion in the case of Green *v.* Hart,

1 Johns. 580, in which it was held that the transfer of a note, secured by mortgage, being in writing, the mere delivery of the mortgage security was a sufficient assignment. It is true that Judge Spencer remarks, that 'mortgages are not now considered as conveyances of lands, within the statute of frauds.' I know that this opinion has prevailed in courts of equity; but I have not been able to find any decided case to support it at law; and it appears to me against the letter and intent of the statute." So in Maine, Mellen, C. J., says:[1] — "The case of Martin *v.* Mowlin has so long been the subject of critieal animadversion by Judge Trowbridge and many learned Judges since his time, that it cannot be deemed an authority." And in Evans *v.* Merriken,[2] Stephen, J., contrasts this language of Lord Mansfield (as to the identity of the debt and mortgage) with his doctrine in the subsequent case of Keech *v.* Hall,[3] decided at a later period of his judicial life, as to the right of possession of the mortgagor or his tenant. (*z*)

40. On the other hand it has been said: — "These *dicta* of Lord Mansfield" (that the mortgage accompanies the

[1] Vose *v.* Handy, 2 Greenl. 333. [2] 8 Gill & J. 46, 47. [3] Dougl. 22.

(*z*) In Shannon *v.* Bradstreet, 1 Sch. & L. 66, Chancellor Redesdale remarked: — "Lord Mansfield had on his mind prejudices derived from his familiarity with the Scotch law, where law and equity are administered in the same courts, and where the distinction between them which subsists with us is not known; and there are many things in his decisions which show that his mind had received a tinge on that subject not quite consistent with the constitution of England and Ireland in the administration of justice. It is a most important part of that constitution, that the jurisdictions of the courts of law and equity should be kept perfectly distinct; nothing contributes more to the administration of justice; and although they act in a great degree by the same rules, yet they act in a different manner, and their modes of affording relief are different; and anybody who sees what passes in a court of justice in Scotland, will not lament that this distinction prevails. But Lord Mansfield seems to have considered that it manifested liberality of sentiment, to endeavor to give the courts of law the powers which are vested in courts of equity."

note), "are criticized by Judge Trowbridge, and conjectured by him to have been put down by the reporter by mistake, or without the accompanying qualifications or limitations. But the opinion is very lengthy, and, if not furnished by him in writing, must have undergone his examination, and have had his deliberate approbation as reported. No Judge was ever more celebrated and admired for his luminous and improved views of the common law, and the adaptation of it to the advancing state of society, than he was. Judge Trowbridge had doubtless drawn his conclusions from the more ancient sources of the common law; and no doubt found it difficult, in common with the rest of us, to forego his veneration of Lord Coke. The doctrine of Lord Mansfield, however, in regard to mortgages, would seem not to have been entirely repudiated by the jurists of modern times."[1]

41. The intimate connection, above referred to, between a mortgage and the debt secured by it, has an important bearing upon the rights of *joint* mortgagees, more especially where one of them has died. (*a*)

[1] Per Whitman, C. J., Wilkins *v.* French, 20 Maine, 116, 117.

(*a*) See George *v.* Baker, 3 Allen, 326, n. In case of joint *mortgagors*, having distinct interests, though joining in one deed, equitable rules of apportionment and adjustment will be applied, similar to those adopted in case of joint mortgagees. Thus, if two persons join in mortgaging their estates, to secure a sum advanced to them in different proportions, and one of them afterwards mortgages to the same mortgagee property, a part of which is included in the former deed, the mortgagee, in a suit for foreclosure, cannot charge the estate of the other mortgagor with more than the first advance. Higgins *v.* Frankis, 15 L. J., ch. 329, N. S. Three tenants in common gave a power of attorney to make improvements and raise money therefor by mortgage, which was done. The share of one was not liable to be mortgaged, in consequence of a marriage settlement. Held, the others were liable only for their respective shares of the debt. Cumming *v.* Williamson, 1 Sandf. Ch. 17. Where two unite in mortgaging their lands, owned in severalty, each is presumptively liable for half the debt, and his lands are primarily chargeable to that extent; and a subsequent unrecorded agreement, by which one agrees to pay off the whole debt, does not affect subse-

42. In Rigden *v.* Vallier,[1] Lord Hardwicke remarked: — "This Court has determined, that if two men jointly and equally advance a sum of money on a mortgage, and take that security to them and their heirs, without any words *equally to be divided between them*, there shall be no survivorship; and so if they were to foreclose the mortgage, the estate should be divided between them, because their intent is presumed to be so." So Judge Story says, that "If two persons advance a sum of money by way of mortgage, and take a mortgage to them jointly, and one of them dies, the survivor shall not have the whole money due on the mortgage, but the representative of the deceased party shall have his proportion, as a trust; for the nature of the transaction, as a loan of money, repels the presumption of an intention to hold the mortgage as a joint tenancy."[2] But it is held, that a surviving mortgagee may bring a suit to foreclose.[3]

43. In Massachusetts, if a mortgage is given to secure a joint debt, it shall be so construed as to create a joint estate, notwithstanding the provisions of the statute making all conveyances to several persons tenancies in common, unless a joint tenancy is expressly provided for. Such mortgage is construed with reference to the nature of the transaction, and the object the parties had in view.[4] But after foreclosure the mortgagees become tenants in common. The land is no longer a mere incident to the debt, liable to be released by a release of the debt made by one mortgagee. The foreclosure operates as a new purchase, as much as if the mortgagees had received payment of the debt, and laid out the money in buying the land. So, where a mortgage is made to secure

[1] 2 Ves. sen. 258. See Tyler *v.* Taylor, 8 Barb. 585.
[2] Story's Eq. § 1206.
[3] Williams *v.* Hilton, 35 Maine, 547.
[4] Appleton *v.* Boyd, 7 Mass. 131; Burnett *v.* Pratt, 22 Pick. 557; Rev. Sts. 406; Goodwin *v.* Richardson, 11 Mass. 469; Randall *v.* Phillips, 3 Mas. 384; Johnson *v.* Brown, 11 Fost. 405.

quent *bonâ fide* purchasers of his lands, without notice of the agreement. Hoyt *v.* Doughty, 4 Sandf. 462.

several debts to several persons, if the debts are equal, the mortgagees will have an equal interest in the mortgaged estate, and in case of foreclosure will hold it in equal proportions. But if the debts are unequal, the purparties of the tenants will be in exact proportion to the amounts of their respective debts.[1]

44. A mortgage, given to two persons, to secure their several debts, is several and not joint. Each mortgagee has a right to enforce his claim under the mortgage, in a form adapted to the case. Upon the death of one, the doctrine of survivorship does not apply, and the surviving mortgagee cannot maintain an action on the mortgage to enforce the payment of the debt due to the deceased.[2]

45. It seems, if a mortgage is made to two, to secure a debt to one only, they take the legal estate as tenants in common; but the party not interested in the debt holds his moiety as trustee for the other.[3]

46. In consequence of the peculiar nature of the mortgagee's interest, as being a mere lien or pledge, such interest is not liable to be *taken and sold on execution* by his creditors. This point seems to be fully established, where the mortgagee has not taken possession; and the only doubt in regard to it is, whether *entry* for breach of condition vests in the mortgagee a title, which can be reached by legal process.[4]

47. In Connecticut, in a case where the *law-day* had expired, but no decree of foreclosure passed, Hosmer, C. J., says: — "The land cannot be taken for the debts of the mortgagee *until his entry* upon it, and in my opinion until foreclosure." [5]

48. In New Hampshire it is held, that, *before entry* to foreclose, the mortgagee's estate is not subject to execution, though judgment has been rendered upon the mortgage, and a writ of possession issued.[6]

[1] Donnels *v.* Edwards, 2 Pick. 617.
[2] Burnett *v.* Pratt, 22 Pick. 556.
[3] Root *v.* Bancroft, 10 Met. 47.
[4] See Phillips *v.* Hawkins, 1 Branch, (Flor.) 262.
[5] Huntington *v.* Smith, 4 Conn. 237. See McGan *v.* Marshall, 7 Humph. 121.
[6] Glass *v.* Ellison, 9 N. H. 69.

49. In the case of Blanchard *v.* Colburn,[1] in Massachusetts, Parker, C. J., assigned various reasons for this doctrine. Land mortgaged is not the *real estate* of the mortgagee, within the meaning of the statute, which provides for the extending of executions upon such estate. "The difficulties of levying upon land mortgaged, to satisfy a debt due from the mortgagee, are insuperable. The debt may require only a small part of the land to satisfy it, and several executions may be levied by several persons; and this would embarrass the mortgagor or his heirs, if they should choose to redeem. Besides, the land mortgaged is only a pledge for the debt, which may be, and often is, assignable in its nature; and if it be assigned, the mortgagor may pay it to the assignee, and thus discharge his mortgage, notwithstanding the creditors of the mortgagee may have taken the land in execution. These difficulties have caused the prevalent opinion, that lands so situated are not subject to the debts of the mortgagee; at least not until he shall have entered with a view to foreclose." In this case, the Court seem to be of opinion, that, if it had appeared by direct evidence, or facts had been proved from which a presumption might be raised, that the mortgagee had entered before the levy, such levy would have been good; but the point was not expressly decided. (*b*)

[1] 16 Mass. 346; Huntington *v.* Smith, 4 Conn. 237.

(*b*) An early commentary upon the law of mortgages in Massachusetts, often referred to and quoted, takes a somewhat different view of this particular topic: —

"If, then, a mortgagee has an estate or interest in the land, why may it not be attached, and taken from him by his creditors, as well as the mortgagor's right of redemption? A term in England may be extended on an *elegit* as part of the debtor's land, or may be delivered to his creditor at the appraised value, as part of the debtor's personal estate. And a creditor may take half of the debtor's land in execution on *elegit*, and consequently may take lands mortgaged in fee. A different doctrine involves us in the greatest absurdities, which appear most glaring when we apply it to mortgaged lands in possession of a mortgagee after forfeiture. The province law of 8 Wm. III. ch. 3, provides, that all lands and tenements belonging to any

50. Upon the same principle, in Eaton *v.* Whiting,[1] the interest of a mortgagee was held not liable to be *attached* upon mesne process. (*c*) The mortgage is said to be a *chose in action*, at least till an entry to foreclose, and to be in the nature of a pawn or pledge, which cannot be taken upon an execution against the pledgee. Nor is the creditor of the mortgagee without remedy, because the mortgagor may be summoned as trustee of the mortgagee, and payment upon this process would discharge the mortgage *pro tanto*. The Court finally

[1] 3 Pick. 488; Marsh *v.* Austin, 1 Maine, 282; Jenkins *v.* Quincy, &c., Allen, 235; Thornton *v.* Wood, 42 7 Gray, 373.

---

person in his own proper right in fee may be taken in execution — where he doth not tender the officer personal property. Mortgages of land in fee are either real or personal estate of the mortgagee. If real, then they are lands and tenements belonging to the mortgagee, &c. — if the personal estate of the mortgagee, they may be taken as his personal estate. The act of 6 Geo. I. empowers a creditor to take his debtor's real estate in execution. This statute extends to all lands and tenements in which the debtor has any estate, whether conditional or absolute. The creditor will thereby have an estate, which will last as long as the debtor's estate would have continued. If lands or tenements mortgaged are taken in execution for the debt of the mortgagee, the creditor thereby becomes a purchaser of that part so taken; and the mortgagee may redeem in a year, or the mortgagor may redeem the whole by payment of the principal sum lent, and the interest, &c., or lodging it in Court, in which case the mortgagee and his creditor must surrender up the land to the mortgagor, and release their rights in it, or the Court will give judgment for the mortgagor to have possession of the land, and issue execution accordingly, and deliver to the creditor the money due to him, and the mortgagee the overplus, if any there be. Where the whole of the land is not taken in execution, the mortgagor, as well as his creditor, is to be made a party to the mortgagor's suit in equity. Each will receive what is respectively due to him." Reading of Judge Trowbridge, 8 Mass. 565–568.

By statute, mortgages held by *Banks* are liable to legal process. Mass. Rev. Sts., ch. 36, §§ 52–54. So, by *Insurance Companies*. Sts. 1854, ch. 453, § 11.

In Florida, if a mortgagee's interest is sold on execution, the purchaser takes it subject to redemption. Cotten *v.* Blocker, 6 Florida.

(*c*) So that of the execution purchaser of an equity. 42 Maine, 282.

consider it as "settled law, that the interest of a mortgagee before entry is not attachable."

51. The peculiar nature of the mortgagee's interest, as above explained, appears from the disposition which the law makes of it *after his death*. Upon this subject it is well settled, that, on the death of the mortgagee, his estate goes to his *executors*, not to his *heirs;* is primarily liable for debts; and passes by a devise, though not executed with the formalities necessary to a will of real estate. (*d*) So a mortgage is

(*d*) In Massachusetts, *before entry* of the mortgagee, his heirs take no title to the land. Steel *v.* Steel, 4 Allen, 421. In Maine, Massachusetts, Rhode Island, and Michigan, it is provided by statutes, that the executor, &c. of a mortgagee may recover possession of the land and hold it as assets, and shall be seised to the use of the heirs, widow, or devisees, (in Maine,) and (in Massachusetts and Maine,) of creditors also, or of the same persons who might claim the money, if paid to redeem the land. In Massachusetts and Rhode Island, it may be sold, by license of Court, for payment of debts. (Judge Story says, by a statute of Rhode Island, debts due by mortgage are personal property, and distributed as such. And where the mortgagee has deceased without taking possession, the debt is deemed personal assets, and the mortgage under the same control of the executor, &c., as if it were a pledge of personal estate (acc. Me. Rev. Sts. ch. 89); and he may recover possession by ejectment, and may discharge the mortgage on payment, by release, quitclaim, or any legal conveyance. Dexter *v.* Arnold, (1 Sumn. 114.) In Maine and Maryland, an executor may discharge a mortgage. Mass. Rev. Sts. 430; 1 Smith, 166, 167; Me. Rev. Sts. ch. 89; R. I. L. 233, 234; Mich. L. 57; Md. L. 2528. See Root *v.* Bancroft, 10 Met. 48; McCall *v.* Lenox, 9 S. & R. 304; Fox *v.* Lipe, 24 Wend. 164; Pierce *v.* Brown, 24 Verm. 165. In Wisconsin, (Rev. Sts. 368,) the mortgage is assets, and the executor, &c. may foreclose. In case of redemption or sale under a power, the executor releases. If he purchases the estate, he is seised for the parties in interest. He may sell the mortgage for payment of debts and legacies. If not sold, it is distributed as personal estate. In New York it has been held, that, after condition broken, the legal title passes to the heir, though perhaps in trust for the executor. The former must bring an action. Van Duyne *v.* Thayre, 14 Wend. 236. A statute was passed in England in 1850, designed to reconcile the conflicting interests of the personal representative and the heir of a deceased mortgagee; but has been held inapplicable, in a late case, unless "the money due in respect of the mortgage has been paid to a person entitled to receive the same." Catherine Meyrick, 4

properly discharged by the administrator.[1] And one joint executor may assign a mortgage.[2] So, proceedings to foreclose a mortgage being legal proceedings, the legal right of an intestate passes to his administrator, who may assert it as the intestate would have done.[3] "The mortgage is a mere chattel interest, of which the administrator has the control. He is responsible for the debt for which it is a pledge."[4]

52. "By the common law, if the conditions of defeasance of a mortgage of inheritance be so penned, that no mention is made either of heirs or executors to whom the money should be paid; in that case the money ought to be paid to the executors, in regard that the money came first out of the personal estate, and therefore usually returns thither again; but if the defeasance appoints the money to be paid either to heirs or executors disjunctively, there, by the common law, if the mortgagor pay the money precisely at the day, he may elect to pay it either to the heirs or executors, as he pleaseth. But where the precise day is past, and the mortgage forfeited, all election is gone in law: for in law there is no redemption. Then, when the case is reduced to an equity of redemption, that redemption is not to be upon payment to the heirs or executors of the mortgagee, at the election of the mortgagor; for it were against equity to revive that election;

[1] Ely *v.* Schofield, 35 Barb. 330.
[2] George *v.* Baker, 3 Allen, 326 n.
[3] Riley *v.* McCord, 24 Mis. 265.
[4] Per Parker, C. J., Scott *v.* McFarland, 13 Mass. 311. See Babbitt *v.* Bowen, 32 Verm. 437; Nagle *v.* Macy, 9 Cal. 426.

Eng. Rep. 144. See Simpson *v.* Ammons, 1 Binn. 177. In Richardson *v.* Hildreth, 3 Cush. 227, Bigelow, J., distinguishes between the case of a deceased mortgagee, and that of a deceased owner of real estate, which is required for payment of debts. There the seisin is vested in the heirs, and the authority to sell may be executed without actual possession.

Where the executor *forecloses* a mortgage, the legal title vests in the heir, even though the Court decree possession of the estate and the title-papers to the executor. Upon this ground, it is held, that the heir should be joined as party. Osborne *v.* Tunis, 1 Dutch. 633.

In case of foreclosure, the estate vests in the parties *entitled to the money*, unless needed for administration purposes. Fifield *v.* Sperry, 20 N. H. 338.

for then the mortgagor might defer the payment as long as he pleaseth, and at last for a composition by payment of the money to that hand which will use him best; much less can the Court elect or direct the payment where they please, for a power so arbitrary might be attended with many inconveniences throughout. Therefore, to have a certain rule in these cases, and a better cannot be chose than to come as near unto the rule and reason of the common law as may be. Now the law always gives the money to the executor where no person is named, and where the election to pay to either heir or executor is gone and forfeited in law, it is all one in equity as if either heir or executor were named, and then equity ought to follow the law and give it to the executor; for in natural justice and equity, the principal right of the mortgagee is to the money, and his right of the land is only as a security for the money; wherefore when the security descends to the heir of the mortgagee, attended with an equity of redemption, as soon as the mortgagor pays the money, the lands belong to him, and only the money to the mortgagee, which is merely personal, and so accrues to the executors or administrators of the mortgagee."[1] And in another early case it is said, a condition to pay executors and administrators shows that the mortgage is regarded as a chattel interest, and the heir cannot claim under it. If the word *heirs* be added, the same construction would probably be adopted, though the true meaning might be more doubtful.[2] (*e*)

[1] Per Lord Keeper Finch, Thornborough *v.* Baker, Cases in Chancery, 1, 284, 285.

[2] Pawlett *v.* At.-Gen., Hardres, 467.

(*e*) A mortgagee in fee died intestate, as to the mortgaged premises, but appointed an executor. His heir at law could not be found, or was unknown. The mortgage-money was still due, and was not intended to be paid off; but the executor, wishing to make a transfer of the mortgage, petitioned, under the 19th section of the 13 & 14 Vict. c. 60, (the Trustee Act, 1850,) for an order vesting the mortgaged premises in him. Held, the Court had jurisdic-

53. In Massachusetts, it was formerly held, that upon the death of a mortgagee the estate descends to his heir, who holds in trust for the executor; the land being a deposit for the money, and the heir a surety to keep the pledge.[1] But subsequently the Court held,[2] that, according to the general principles relating to mortgages, as well as by express statute, the heirs of a mortgagee cannot bring a suit for foreclosure. The effect of such a suit might be, that the heirs, who give no bonds, would get possession of assets required for payment of debts; and the fact that no administrator had ever been appointed, though twenty years had elapsed from the mortgagee's death, would make no difference. The Court proceed to comment upon the doctrine of Judge Trowbridge, that the estate of a mortgagee descends to his heirs, as being advanced at a time when no statute existed on the subject, and chiefly for the purpose of refuting Lord Mansfield's supposed views as to mortgaged estates. They further remark, that, if a mortgagee enter *before condition broken*, and die, he may be considered as having died seised of a defeasible estate; but still the executor, &c., would have the right of possession. And in a still later case,[3] where a mortgagee deceased had entered for condition broken, agreeing that the mortgagor might remain in possession, paying interest as rent till foreclosure or redemption; and the demandants sued as heirs of the mortgagee: it was held that the action could not be maintained. Wilde, J., says:[4] — "The tenant might have pleaded the mortgage, and restricted the demandants to a conditional judgment, — although the mortgagee entered, he had not recovered possession within the

[1] Reading of Judge Trowbridge, 8 Mass. 554.
[2] Smith *v.* Dyer, 10 Mass. 18.
[3] Dewey *v.* Van Deusen, 4 Pick. 19.
[4] Ibid. 21.

---

tion upon such a petition to make the order, and that the legislature did not mean to confine its authority to the case of a simple "reconveyance." Boden's Estate, 9 Eng. Law & Eq. 223.

true meaning of the statute; he had the legal but not the actual possession; and therefore the action should have been brought by the administrator."

54. A statute having provided, that the mortgagee should release on payment, after recovering possession; a possession obtained by his administrator, by entering without suit, was held within the equity of the statute.[1]

55. Where a mortgagee died, after recovering a conditional judgment; it was held that his administrator might bring a writ of entry against a devisee of the mortgagor to recover possession, having ultimately entered under the former judgment.[2]

56. In Maine, under a statute which provided that an administrator might assign a mortgage, it was held that this might be done by a quitclaim deed, if the intent so appeared.[3]

57. In New Hampshire, if an executor takes a mortgage to secure a debt due the estate, and forecloses, it enures to the benefit of the estate, the legatees or heirs, under the direction of the Probate Court. The executor gains no title, except in his official capacity.[4]

58. The question, what words in a will are necessary to pass a mortgage held by the testator, has been often discussed in English and American cases, and has been the subject of somewhat conflicting decisions. In Ballard *v.* Carter,[5] Parker, C. J., remarks upon the clause of the will in question in that case, as follows: — "Whether this conveyance is to be considered a mere pledge or security for the money, or as giving a title to land so as to constitute real estate in the hands of the testator, it must be considered as devised under the words, 'all my estate, whether real or personal, which may remain,' &c. This, however, according to some of the authorities, might be questioned. In 3 Ves.

[1] Scott *v.* McFarland, 3 Mass. 311.
[2] Richardson *v.* Hildreth, 8 Cush. 224.
[3] Crooker *v.* Temell, 31 Maine, 306.
[4] Thurston *v.* Kennett, 2 Fost. 151.
[5] 5 Pick. 115. See Field's, &c. 7 Eng. Law & Eq. 260.

jun. 348, it was determined that the legal estate of a mortgagee in mortgaged premises did not pass by a general residuary devise of 'all his estate and effects whatsoever and wheresoever.' So in 1 Atk. 605, it was decided, that by a devise of all lands, tenements, and hereditaments, a mortgage in fee should not pass. But in 2 P. Wms. 198, it is held, that a devise by a trustee of all the rest of his real estate will pass the trust estate, and in the note of Butler to Co. Lit. 203, (note 96,) it seems to be considered by that learned editor, that a mortgage will pass under such a devise, and the cases of Marlow *v.* Smith, 2 P. Wms. 198, and Attorney-General *v.* Phillips, are cited. It would be a fruitless task to go over all the cases of the English books on this subject, with a view to reconcile them. It is enough for us, that under the terms of the residuary clause in this will, it being expressly a devise of both real and personal estate, we are satisfied that this estate would have passed, had it remained unchanged until the death of the testator." So Chancellor Kent remarks,[1] that a mortgagee being, till foreclosure, a *trustee* for the mortgagor, the mortgage will pass under general words in the will of the former relating to real estate, unless a contrary intent is to be gathered from the language of the will, or the testator's purposes and objects. (*f*)

[1] Jackson *v.* De Lancy, 13 Johns. 537.

(*f*) Upon the same subject, the same learned judge further remarks: — "On reading these latter cases, we are almost involuntarily led to pause, and wonder at the extraordinary and very unaccountable perplexity, doubt and alternation of opinion, which they discover on this point. The learned men referred to in these cases do not appear to me, with all proper humility be it spoken, to have examined this question with the diligence or the talent worthy of the eminent reputation they bear. If indeed they did, the reports have done them great injustice. Lord Eldon had studied the question with profound attention, and he showed it to be perfectly clear and settled; but in the other modern chancery cases on this point, we find nothing but what tends to expose the inefficiency of legal learning, and the weakness of human reason." Jackson *v.* DeLancy, 13 Johns. 559.

59. The interest of a mortgagee, deceased, is so strictly construed as personal estate, that, though the heir be in possession, after breach of condition, and no want of assets, he shall be decreed to convey to the administrator.[1] But if the

[1] Ellis *v.* Guavas, 2 Cha. Cas. 50.

Devise of all the rest and residue of the testator's freehold, leasehold, and copyhold estates in possession or reversion, with all his goods, chattels, &c., *mortgages* and debts, subject to the payment of his debts, &c., and appointing the legatee to be his executor. Held, the legal estate in the mortgaged premises descended to the heir, because the devise was made subject to payment of debts, and to this purpose the money secured, and not the land, was alone applicable. Silvester *v.* Jarman, 10 Price, 78. Devise of all the rest, residue, and remainder of and in all and singular the property, estate, and effects which the testator should be possessed of or entitled to, or over which he should have a disposing power, at his decease, of whatsoever nature or kind the same might be. Held, the legal estate in mortgaged premises did not pass by this devise, but descended to the heir. Harriett, &c., McLel. & Y. 292. The legal estate in property, vested in a testator by way of mortgage, does not pass under the terms, "securities for money," or "money invested on any security." Ex parte Priel, (Vice-Chancellor's Court,) Law Rep. June, 1850, p. 92. But a bequest of personal estate passes mortgages. Asay *v.* Hoover, 5 Barr, 21. A testator sold the land devised, taking back a bond and mortgage for part of the price. Held, the devise was revoked, and the bond and mortgage did not pass by the will. Beck *v.* McGillis, 9 Barb. 35. The rule, of treating a mortgage as personal property, in a devise, has been held not applicable to lands originally held under old mortgages. These pass by a general devise, though no release of the equity of redemption appears. Atty. &c. *v.* Bowyer, 5 Ves. 299. Upon this subject Lord Loughborough says, (Ibid. 303): — "What is personal estate is to be decided at the time of the death. If it is no longer money, but land, by a release of the equity of redemption, it will go to the devisee of the freehold or leasehold estate; and I would never suffer the personal representative to take that as personal estate. It is no longer money. At the date of the will, I take it, upon the report, it was mere money, a mortgage title; but if he lived the period, when all the equity of redemption was gone, then it exists in no shape as part of his property, but as land, held either by a leasehold title or a freehold title; and I would never take it up again as money in favor of the executor. There is no equity between the heir and executor, or the devisee and executor."

debt be paid, and a bill brought for reconveyance, the heir of the mortgagee must be made party.[1]

60. A statute of Massachusetts, 1788, ch. 51, provided, that mortgaged premises should be assets in the hands of executors and administrators, as personal estate. Also, that the executor or administrator of a deceased mortgagee, having recovered possession of the estate by a suit at law, should be seised to the sole use and behoof of the widow and heirs, &c.; with a proviso, that the property might be distributed by the Judges of Probate as personal estate, unless necessary for payment of debts, &c., in which case it might be sold under a license in the usual mode. The Court held, that this statute had the effect of vesting all authority over mortgaged estates, not taken possession of by the mortgagee in his life, in his executor, &c., as trustee of creditors and others interested in the personal estate.[2]

61. In the case of Boylston *v.* Carver,[3] this provision was held not to vest in the widow, &c., an executed *use*, under the statute of uses, but to give the administrator a trust, to continue till certain purposes are accomplished thereby. If necessary for payment of debts, &c., he is to sell under a license; if not, the Probate Court will pass a decree of distribution among those entitled to the personal property, and it may vest in them by virtue of such decree, declaring the use, of the statute of uses, and the statute authorizing such distribution; or perhaps the administrator, in execution of his trust, may be required to execute a deed without warranty, conformably to such decree.

62. In the case of Webber *v.* Webber,[4] the Court in Maine were of opinion, that the words "seised to the use of the widow and heirs," should be so construed, as to vest the estate in the heirs, after the period of redemption had expired,

[1] Silvester *v.* Jarman, 10 Price, 78.
[2] Johnson *v.* Bartlett, 17 Pick. 484. See McCall *v.* Lenox, 9 S. & R. 304; Gay *v.* Minot, 3 Cush. 352.
[3] 4 Mass. 609.
[4] 6 Greenl. 127.

and all the purposes been accomplished for which the administrator became a trustee.

63. In the case of Johnson *v.* Bartlett,[1] where an administrator had thus recovered possession of the land mortgaged, the mortgagor conveyed to him all his right and title, specifying it as a right to redeem the mortgage, but not expressly as administrator. It was held, that the conveyance operated as a release of the equity of redemption, and vested an absolute title in the administrator, but subject to the same trusts as his former estate; and that a sale by him, without license, either passed no title, or one subject to the like trusts in the hands of the purchaser, who should be presumed to have notice thereof, inasmuch as they were created by law, and depended upon acts and conveyances which were matter of record. The Court remarked, that the administrator had the same right to foreclose the mortgage in this way as in any other, and this was the real intent and effect of the transaction. A contrary construction would charge the parties with fraud, which is never to be presumed.

64. In New Hampshire, an administrator may foreclose by entry and possession for one year, as the deceased might have done. Upon foreclosure, the legal title vests in the heirs, subject to his rights as trustee. It is there held the duty of the administrator to foreclose the mortgage, if the debt is not paid; but he may elect between an action and a peaceable entry for this purpose.[2]

65. It has been held in Massachusetts, that the estate of a deceased mortgagee in the mortgage, though not strictly real property, so far partakes of that character, as to require a license from the Probate Court, to justify a sale of it by the administrator.

66. In the case of Blair,[3] a petition was presented to the Judge of Probate by administrators for leave to sell a note and mortgage, not due, and on which mortgage no possession had been taken. The petition set forth that the estate

[1] 17 Pick. 477. [2] Gibson *v.* Bailey, 9 N. H. 168. [3] 13 Met. 126.

was insolvent, and would be prejudiced by waiting for payment of the note at maturity. The Probate Court dismissed the petition, on the ground that such sale might be made without license, and the petitioners appealed. Held, the decree should be reversed, and the case remanded to the Court below. Shaw, C. J., says:[1] — "We are of opinion, that the Court of Probate has authority to grant a license, in such cases, and that the petition presents a fit case for the exercise of it. It may be probable that the legislature, by the terms 'real estate so held by an executor,' &c., had more immediate reference to mortgaged estate, on which the executor, &c., had entered *in pais* or by a judgment. But the terms are broad enough to cover all estate mortgaged to the testator. The right to enter, and the right to maintain a real action, given by § 11, imply that the executor or administrator has a qualified seisin, and holds the estate. And the reason of the provision for a license to sell applies as strongly to estate of which the administrator has not obtained possession, as to that on which he has entered. It appearing to us, that a license is necessary, by law, to enable the administrator to sell the said mortgaged estate and the note secured thereby, the case is to be remanded." (*g*)

67. In Gibson *v.* Bailey,[2] decided in New Hampshire, Parker, C. J., remarks upon this subject: — "Whether the administrator has, in such case, any right to sell except under a license from the Judge of Probate; and whether the property, when the mortgage is foreclosed, is to be distributed as personal estate; or whether, in case the administrator

[1] 13 Met. 127. [2] 9 N. H. 173.

(*g*) By St. 1849, ch. 47, any real estate held by an executor, &c., in mortgage, may be sold before foreclosure, in the same manner as personal estate is sold. And by St. 1851, ch. 288, all transfers of mortgaged real estate by executors, &c., subsequent to the Rev. Sts., and prior to the act of 1849, are declared effectual and confirmed, though made without license of Court.

does not sell, it is to be treated as if the absolute fee had been conveyed to the intestate at the date of the mortgage, so that a widow would be entitled to dower only, are questions upon which it is not necessary for us now to express an opinion."

CHAPTER XII.

ESTATE OF THE MORTGAGEE. — WHAT CLAIMS AND DEMANDS SHALL BE SECURED BY THE MORTGAGE. — TACKING. — FUTURE ADVANCES.

1. Construction of the condition of a mortgage. Ambiguity of description. Variance between the mortgage and personal security, &c.
22. *Tacking.*
33. Whether adopted in the United States.
41. Future or subsequent advances.

1. In considering the nature of the mortgagee's title, and the connection between the *deed* and the *debt* thereby secured, it is proper to inquire, for what claims and demands a mortgage shall stand as security. Ordinarily, the debt designed to be secured is so distinctly specified in the deed, as to admit of no doubt, construction, or enlargement. Sometimes, however, questions have arisen upon this point, either from an ambiguity of description, or an attempt to extend the operation of the mortgage to claims which are only by implication to be brought within its terms. (*a*) The general rule is laid down, that "to some extent, *parol evidence* may be properly resorted to, for the purpose of showing whether the demand exhibited was really the subject of the mortgage."[1] (*b*) And it will be seen, that the law itself

[1] Per Dewey, J. Baxter *v.* M'Intire, 13 Gray, 171.

(*a*) See Goldsmith *v.* Brown, 35 Barb. 484; Mobile, &c. *v.* Talman, 15 Ala. 472; Griffin *v.* Cranston, 1 Bosw. 281; Byers *v.* Fowler, 14 Ark. 86; Hamilton, &c. *v.* Reynolds, 5 Duer, 671; Ross *v.* Utter, 15 Ill. 402.

(*b*) If a mortgage is made expressly to secure *written* liabilities, it cannot be applied to any debt not in writing. And, in the absence of fraud, the mortgagor is not estopped to deny the existence of any written security. Walker *v.* Paine, 31 Barb. 213.

Where parol evidence is admitted for the plaintiff, the effect of which is to reduce the defendant's liability from that specified in the mortgage, it is

has in some cases sanctioned, by virtue of an established rule of equity jurisprudence, a still wider and more important enlargement of the literal terms of a mortgage.

2. Cases have arisen, of discrepancy between the mortgage and the personal security.

3. Upon the general ground, that the personal security is the principal, and the mortgage merely incident or collateral, it has been held, that, where the mortgage is conditioned to pay a particular sum, but also to secure a bond, the condition of which covers all the liabilities of the mortgagor to the mortgagee, the mortgage shall be construed in conformity with the bond.[1] So A. gave to B. a mortgage, dated September 21, 1853, which recited, that it was given to secure to B. the payments of a bond of the same date, in the penal "sum of $3,000, conditioned for the payment of $1,500 in three annual payments, with interest, from the 1st day of May, 1853; and further, that," in case of default in the payment of the principal sums and interest aforesaid for thirty days from the time they became due, &c., the mortgagee might sue out a *sci. fa.* Held, that resort might be had to the condition of the bond to ascertain the time when the annual payments were due; and, it being provided therein that the $1,500, with the interest from May 1, was to be paid in three annual payments from that date, that the first was due on the 1st day of May, 1854.[2] So, where a mortgage is given to secure a bond, with penalty; in a suit for foreclosure, judgment can be given only for the amount of the penalty, though less than the amount due.[3] But where a mortgage contained a condition, that the mortgagor should pay the debt according to the condition of a bond recited in the deed, by which it was made payable on a day already passed; held, the mortgage was still valid in equity.[4]

[1] New Hampshire, &c. *v.* Willard, 10 N. H. 210.
[2] Kennedy *v.* Ross, 25 Penn. 256.
[3] Harper *v.* Barsh, 10 Rich, Eq. 149.
[4] Hughes *v.* Edwards, 9 Wheat. 489.

---

not competent for him to object to such evidence. Baxter *v.* M'Intire, 13 Gray, 168.

4. A similar ambiguity may arise in regard to the name of a party. Thus a note was made to *E. H.*, payable on demand with interest. Some months afterwards, the promisor made a mortgage to *E. H. 3d*, conditioned for payment of a note of the same date, for the same sum, on demand, with interest. Held, in an action on the mortgage, parol evidence was admissible, that E. H. and E. H. 3d, were partners, doing business in the name of E. H., and that the note was made for a debt due the firm, and was the note referred to and secured by the mortgage. (In the same case, the mortgage described the note as dated *one thousand seventeen hundred* and ninety-eight. The Court remarked: "This is so palpably a clerical mistake, that no reliance is made upon it by the counsel.") [1]

5. In general, a mortgage made to guaranty a loan is invalid, unless the loan is correctly recited in the mortgage.[2] But foreclosure may be had for a demand, the amount of which remains to be liquidated after the judgment.[3]

6. Several mortgages, appearing on their face to be for distinct debts, in equity may be shown to be merely additional evidence of and security for one debt.[4] So a bond was made for $2,000, with a mortgage to secure, and referring to the bond, but leaving a blank for the amount. The mortgage was recorded, but soon afterwards the mortgagor executed a sealed instrument, stating that the sum was omitted by mistake, which writing was attached to the registry. A second mortgage was made, to one who had seen such registry. Held, the first mortgage should prevail.[5] So, where a mortgage describes the debt as being for five hundred dollars, but two notes are produced for five hundred dollars each, which the mortgage was given to secure, it shall be security for both.[6] So, where a mortgage is made to secure certain notes described therein, but which by mistake are left with the mortgagor, and others taken by the mortgagee; the mort-

[1] Hall *v.* Tufts, 8 Pick. 455–460; acc. Williams *v.* Hilton, 35 Maine, 547.
[2] Thomas *v.* Olney, 16 Ill. 53.
[3] Richards *v.* Bibb, 24 Geo. 198.
[4] Anderson *v.* Davies, 6 Munf. 484.
[5] Lambert *v.* Hall, 3 Halst. Ch. 410, 651.
[6] Crafts *v.* Crafts, 13 Gray, 360.

gagee may have relief in equity against a subsequent mortgagee. So, if the notes are wrongly described.[1] So where a deed does not describe the rate of interest or the times of its payment, but shows clearly that the note bears interest; this is sufficient to put a subsequent incumbrancer upon inquiry, and he can take no advantage of the omission.[2]

7. But where a mortgage was conditioned for payment of a certain sum on a certain day, the year being left blank, according to the tenor of a note for the same sum; and the mortgagee brought an action for breach of the covenants in the mortgage; and it appeared by parol proof, that the note was never made, and only part of the money loaned, for which a receipt was given; held, the action did not lie. Parker, C. J., says: — "The deed must be considered as never having been executed and delivered for the purpose of having effect according to its tenor. The blank shows that something further was to be done; no time of payment is limited; so that it would be necessary to resort to parol evidence. The same species of evidence might be given, to show that that sum had never been lent. The bargain was incomplete, and never took effect."[3] So a mortgage was given to secure a sum of money, to be ascertained by the award of two persons, chosen by the parties, and, in case of disagreement, an umpire to be chosen by the arbitrators. The referees, taking the *data* in the mortgage, were to make out their award, and return it to the parties in writing within thirty days of their appointment. The award failed through misconduct of the arbitrators. Held, the mortgage was thereby defeated, and the mortgagee could have no relief in equity, upon a bill for the sale of the property, and specific execution of the contract.[4]

8. In regard to the *date* and *time of payment* of a mortgage, it has been held, that a mortgage dated 1837, and pay-

[1] Porter *v.* Smith, 13 Verm. 492.
[2] Richards *v.* Holmes, 18 How. 143.
[3] Parker *v.* Parker, 17 Mass. 370-375.
[4] Emery *v.* Owings, 7 Gill, 488.

able in 1830, is payable immediately, and parol evidence is inadmissible to the contrary.[1]

9. In case of a mortgage, conditioned to pay "$1,256.50, with interest, after the first day of April next, in fourteen equal annual instalments, on the first day of April of each and every year after the first day of next April," the obligor is bound to pay the sum in fourteen equal annual instalments, on the first day of April in each year, with interest on each instalment, payable at the time it became due.[2]

10. A recital in a mortgage, that the mortgagor "is indebted" to the mortgagee in a certain sum, for which "he has given his checks," &c., does not imply that the mortgage was made for an antecedent debt.[3]

11. Where a mortgage recited, that on settlement of accounts the mortgagor was indebted to the mortgagee in a certain sum; held, such settlement did not include a note made two days before.[4]

12. A member of an unincorporated banking company executed a mortgage to the officers of the company, reciting that it was to secure his bond for his subscription for stock, and to bind him, in conjunction with each stockholder, "to all and singular, the holders of the notes, bills, checks, and other liabilities of the said company now existing, or which may hereafter exist, at any time within fifteen years;" provided that if he paid and satisfied the bond, and the officers of the company and their successors, for the stock subscribed at the periods when due, and should pay off and discharge all the notes, &c. of the company, the mortgage should be void. Held, the mortgage was not only a security for the subscription, but also to the creditors of the company for their claims; and that a creditor of the company, to whom the mortgage was assigned, might bring a bill to foreclose, when his own

[1] Fuller *v.* Acker, 1 Hill, 473. Acc. Martin *v.* Rapelye, 3 Edw. Ch. 229. See Mobile, &c. *v.* Talman, 15 Ala. 472.

[2] French *v.* Kennedy, 7 Barb. 452.

[3] Bank, &c. *v.* Whyte, 3 Md. Ch. 508.

[4] Tharp *v.* Feltz, 6 B Mon. 6.

debt became due, though no instalment was due on the mortgagor's bond for his subscription.[1]

13. Similar questions arise in reference to mortgages of *indemnity.*

14. A mortgage to secure a certain sum, which may be furnished in materials towards the erection of a house for the mortgagor, does not cover a liability assumed by the mortgagee as surety or guarantor for the mortgagor.[2]

15. It is held that a mortgage of indemnity to a surety need only describe the note so as to identify it; though the sum, date, and name of one of the signers be omitted.[3] And where a mortgage specified the liability of the surety "at about $2,000," when in fact it amounted to only half that sum; but did not profess to state with accuracy the amount of the liability, and the actual liability was at the time unascertained: held, this over-statement was not conclusive evidence of fraud.[4]

16. A mortgage recited, that the mortgagees were indorsers on two bills, when in fact they were indorsers on one only, and paid the other for the honor of the drawer before the mortgage was made. Held, the mortgage was still valid.[5]

17. If the condition is to indemnify a surety, and a certain sum is mentioned, be the debts more or less for which he is surety, the mortgage will cover all the debts for which he was surety.[6]

18. One becoming surety for another, for a certain sum, took from him a note for that amount, secured by mortgage, and afterwards paid the debt. Held, the mortgage was invalid against a subsequent mortgagee.[7]

19. A mortgage may be questioned for the *uncertainty* of the claim secured. But a mere clerical inaccuracy will not affect its validity, if the debt is identified beyond mistake.[8]

[1] Wall *v.* Boisgerard, 11 Sm. & Mar. 574.
[2] Doyle *v.* White, 26 Maine, 341.
[3] Boody *v.* Davis, 20 N. H. 140.
[4] Bumpas *v.* Dotson, 7 Humph. 310.
[5] Fetter *v.* Cirode, 4 B. Monr. 482.
[6] Orr *v.* Hancock, 1 Root, 265.
[7] North *v.* Belden, 13 Conn. 376.
[8] Tousley *v.* Tousley, 5 Ohio, N. S. 78. Acc. 8 Pick. 455; Gill *v.* Pinney, 12 Ohio St. 38; Hurd *v.* Robinson, 11 Ibid. 232.

20. A party owing $10,000, as the balance of an account, gave a mortgage for $3,000. Held, the mortgage was not void for uncertainty against creditors.[1] But a mortgage conditioned to pay a debt due by note, dated May 10,1834, on demand, with interest, was held invalid against a subsequent mortgage.[2]

21. A mortgage was conditioned to pay "on demand, with interest, the sum of $1,500, which I am indebted to him, on book and by several notes, the exact date and amount not recollected, but amounting in the whole, together with the debt on book, to $1,500, or thereabouts." At the making of the mortgage, the mortgagor was in failing circumstances, and, in order to secure the mortgagee, it was necessary to make the deed before the exact indebtedness could be ascertained. The amount actually exceeded $1,500. Held, the mortgage was valid against creditors and subsequent incumbrancers.[3]

22. In this connection may be considered the subject of *tacking*, which, though as a distinct right or claim comparatively unimportant, as will be seen, in American law, occupies much space, and has given rise to numerous and nice questions and distinctions, in the English cases; and still continues to furnish many analogies and illustrations, even where the doctrine itself is for the most part obsolete.

23. With more particular reference to the relative rights of *successive mortgagees*, which, however, is only one of the applications of the word, Judge Story defines *tacking*, as "uniting securities, given at different times, so as to prevent any intermediate purchasers from claiming any title to redeem, or otherwise to discharge, one lien, which is prior, without redeeming or discharging the other liens also which are subsequent to his own title. Thus, if a third mortgagee, without notice of a second mortgage," (at the time of taking his mortgage,) "should purchase in the first mortgage, by which he would acquire the legal title, the second mortgagee

[1] Chester *v.* Wheelwright, 15 Conn. 562.
[2] Hart *v.* Chalker, 14 Conn. 77.
[3] Merrills *v.* Swift, 18 Conn. 257.

would not be permitted to redeem the first mortgage, without redeeming the third mortgage also; for in such a case, equity tacks both mortgages together in his favor. And in such a case it will make no difference, that the third mortgagee, at the time of purchasing the first mortgage, had notice of the second mortgage; for he is still entitled to the same protection." [1] (*c*)

24. The doctrine of tacking has been defended upon various grounds. It is said, *in æquali jure, melior est conditio possidentis.* Where the equity is equal, the law shall prevail; and he that hath only a title in equity shall not prevail against a title by law and equity in another. So the right has been said to be a plank, gained by the third mortgagee in a shipwreck, *tabula in naufragio.* In Wortley *v.* Birkhead,[2] Lord Hardwicke said: — "As to the equity of this Court, that a

[1] Story's Eq. § 412. See Williams *v.* Owen, 13 Sim. 597; Aldworth *v.* Robinson, 2 Beav. 287; Pelby *v.* Wathen, 18 L. J. 281, N. S.; Young *v.* English, 7 Beav. 10; Watts *v.* Symes, 8 Eng. Law & Eq. 247; Baker *v.* Pierson, 6 Mich. 523.

[2] 2 Ves. 573.

(*c*) A third mortgagee may tack, though he buy in the first mortgage *pendente lite*, pending a bill by the second mortgagee to redeem it. This is upon the ground, that he acquires the right by the act of *lending the money* without notice, and is not bound to take measures for his protection, till actual danger occurs. But the right will not be accorded to him, after a decree to settle priorities. Coote, 476, 478; Brace *v.* Duchess, &c. 2 P. Wms. 491; 1 Eden, 530; Bristol *v.* Hungerford, 2 Vern. 524; Knott, 11 Ves. 619. If a creditor by judgment, statute, or recognizance, buys in the first mortgage, he shall not tack the two securities; for such a creditor cannot be called a purchaser, nor has he any right to the land; having neither *jus in re* nor *ad rem*, but a mere lien, which it is doubtful whether he will ever enforce. Besides which, the judgment creditor does not lend his money on the immediate view or contemplation of the land, nor is he deceived or defrauded, though his debtor had before made twenty mortgages of his estate; but a mortgagee is defrauded or deceived, if the mortgagor has already mortgaged his land to another. Coote, 478; Brace *v.* Duchess, &c. 2 P. Wms. 491; 2 Ves. 662. And it is said if the first mortgagee takes the assignment as trustee, he shall not tack the mortgages; otherwise, a mere stranger, purchasing the third mortgage, and declaring he had bought it in trust for the first mortgagee, might tack both together, and defeat all the other incumbrances. Coote, 474; Barnett *v.* Weston, 12 Ves. 130.

third incumbrancer, having taken his security of mortgage without notice of the second incumbrance, and then, being *puisne*, taking in the first incumbrance, shall squeeze out and have satisfaction before the second; that equity is certainly established in general, and was so in Marsh *v.* Lee, by a very solemn determination by Lord Hale, who gave it the term of the creditor's *tabula in naufragio*. That is the leading case. Perhaps it might be going a good way at first; but it has been followed ever since; and, I believe, was rightly settled only on this foundation by the particular constitution of the law of this country. It could not happen in any other country but this; because the jurisdiction of law and equity is administered here in different courts, and creates different kinds of rights in estates. And therefore as courts of equity break in upon the common law, where necessity and conscience require it, still they allow superior force and strength to a legal title to estates; and, therefore, where there is a legal title and equity on one side, this Court never thought fit, that by reason of a prior equity against a man who had a legal title, that man should be hurt; and this, by reason of that force, this Court necessarily and rightly allows to the common law and to legal titles. But if this had happened in any other country, it could never have made a question; for if the law and equity are administered by the same jurisdiction, the rule *qui prior est tempore potior est in jure* must hold." So Judge Story says:[1] — "When we come to the doctrine of tacking, equity there looks to the law, and stays its hand upon that, which constitutes a legal objection to relief." And he further remarks, upon the same subject: — "If a second equitable incumbrancer, without notice of a prior incumbrance, has by his diligence acquired a better equity, he will be entitled to be first paid. A better equity is thus acquired, when the legal estate being outstanding in a trustee, a second incumbrancer without notice of a prior incumbrance, takes a protection against a subsequent incum-

[1] Gray *v.* Jenks, 3 Mass. 522.

brancer, which the prior incumbrancer has neglected to take. Thus, for example, a declaration of trust of an outstanding term, accompanied by a delivery of the deeds, which create and continue the term, will give a better equity than a mere declaration of trust to a prior incumbrancer. So, where a second equitable incumbrancer has given notice to the trustees, in whom the legal estate is vested, he will thereby acquire a priority over a prior incumbrancer, who has omitted to give such notice." [1]

25. The same author refers to the case of Harrison *v.* Ferth,[2] as laying the foundation of this doctrine in England. In that case the purchaser of an estate, having notice of an incumbrance, transferred it to one having no notice; and it was held, reversing a decision of the Master of the Rolls, that the second purchaser should hold, discharged of the incumbrance. Judge Story, referring to this decision, remarks: [3] "This doctrine has ever since been adhered to, as an indispensable muniment of title. And it is wholly immaterial, of what nature the equity is, whether it is a lien or an incumbrance or a trust, or any other claim. Indeed, purchasers of this sort are so much favored in equity, that it may be stated to be a doctrine now generally established, that a *bonâ fide* purchaser for a valuable consideration, without notice of any defect in his title at the time of his purchase, may lawfully buy in any statute, mortgage, or other incumbrance upon the same estate, for his protection. If he can defend himself by any of them at law, his adversary will have no help in equity to set these incumbrances aside." So, in the case of Edmunds *v.* Povey [4] it was argued, that though the trade of buying in incumbrances had been formerly countenanced, yet it was in truth against conscience, and contradictory to many established rules of law and equity. But the Lord-Keeper told the counsel he wondered *they laid their shoulders* to a point that had been so long since settled and received

[1] 2 Story's Eq. 1035 *a*.
[2] Prec. Cha. 61; 1 Story's Eq. § 410.
[3] Story's Eq. §§ 410, 411.
[4] 1 Vern. 187.

as the constant course of chancery; but although he would not change the rule which had so long prevailed in that Court, yet it might be he would do so, when he found a man designing a fraud, and thinking to make a trade of cozening by the rules of the Court.

26. No doctrine of the law has been more generally or more severely condemned than that of *tacking*. Judge Story says: — "There is certainly great apparent hardship in this rule; for it seems most conformable to natural justice, that each mortgagee should in such a case be paid according to the order and priority of his incumbrances. It is assuming the whole case, to say that the right is equal and the equity is equal. The second mortgagee has a prior right, and at least an equal equity; and then the rule seems justly to apply, that where the equities are equal, that title which is prior in time shall prevail. It has been significantly said, that it is a plank gained by the third mortgagee in a shipwreck. But, independently of the inapplicability of the figure, which can justly apply only to cases of extreme hazard to life, and not to mere seizures of property, it is obvious that no man can have a right, in consequence of a shipwreck, to convert another man's property to his own use, or to acquire an exclusive right against a prior owner. The best apology for the actual enforcement of the rule is, that it has been long established, and that it ought not now to be departed from, since it has become a rule of property."[1] In reference to the same subject he remarks, "some of these distinctions are extremely thin, and stand upon very artificial and unsatisfactory reasoning."[2] So Chancellor Kent says:[3] "There is no natural equity in tacking, and when it supersedes a prior incumbrance, it works manifest injustice. By acquiring a still more antecedent incumbrance, the junior party acquires, by substitution, the rights of the first incumbrancer over the purchased security, and he justly acquires nothing more. The doctrine of tacking is founded on the

[1] 2 Story's Eq. §§ 413, 414. [2] 1 Ibid. § 419. [3] 4 Comm. 178.

assumption of a principle, which is not true in point of fact; for, as between A., whose deed is honestly acquired, and recorded to-day, and B., whose deed is with equal honesty acquired, and recorded to-morrow, the equities upon the estate are not equal. He who has been fairly prior in point of time has the better equity, for he is prior in point of right." So Duncan, J., says:[1]—"There is no natural equity in tacking debts, and where it interferes with the rights of others, it is most unjust."

27. Mr. Coventry was of opinion,[2] that the English law of *tacking* is derived from the Civil Law. But Judge Story denies that this principle was adopted in the Civil Law. He says, the rule, *qui prior est in tempore*, &c., was applied, except in the two cases, where the first incumbrancer consented to the second pledge, so as to give a priority, and where the second pledge was for money to preserve the property; and that the doctrine referred to by Mr. Coventry simply gave to a third mortgagee, paying off a first mortgage, the same priority, by way of substitution, which the first mortgagee had, without changing his rights under his own mortgage. Judge Story cites various passages from the text of the Civil Law, which he supposes to have been wrongly interpreted, as sustaining the doctrine that he controverts. He comes to the conclusion, that none of them go further than to authorize a mortgagee to *tack*, as against his own debtor, a second loan, without security, when the debtor seeks to redeem.[3]

28. Upon the same subject he remarks:[4]—"In some cases, by the Civil Law, a sort of tacking of debts could be insisted on by the mortgagee against the mortgagor; but not against intermediate incumbrancers." "It is clear that the Civil Law, in the case of the mortgagor seeking to redeem, did not permit it, unless the mortgagor paid not only the debt for which the mortgage was given, but all other debts due to the mortgagee." But, "where there was a first mortgage, and then a second mortgage, and then the first mortgagee lent another

[1] Anderson *v.* Neff, 11 S. & R. 223.
[2] 2 Pow. 454, n.
[3] 1 Story's Eq. § 415, n.
[4] 2 Ibid. 1010.

sum to the debtor, he could not tack it against the second mortgagee. Mr. Chancellor Kent has said, that in the Civil Law, the mortgagee was even allowed to tack another incumbrance to his own, and thereby to gain a preference over an intermediate incumbrance. If, as I presume, his meaning is, that the tacking gave a preference over the intermediate incumbrancer, with great deference I do not find, that the passage cited supports the doctrine; and it seems contrary to the passages already cited. There are other passages in the code, on the subject of a subsequent mortgagee, acquiring the rights of a first mortgagee, by paying his mortgage, and thereby confirming his own title by substitution. But it appears to me, that they do no more than subrogate the subsequent mortgagee to all the rights of the first mortgagee, and that they do not enlarge those rights. Dr. Brown, too, insists, that a mortgagee might tack another incumbrance to his mortgage; and if he lent more money by way of a further charge on the estate, he was in the Civil Law preferred, as to this charge also, before a mortgage created in the intermediate time. He cites the Dig. lib. 20, &c., which does not (as has been already stated) seem to support the conclusion."

29. As already suggested, the doctrine of tacking is not limited to questions between successive mortgagees. Numerous decisions are found in the books, which relate more especially to this alleged right, as *between the mortgagee and mortgagor* themselves; some of them being cases of different mortgages between the same parties, where a part of the securities were defective; and others, cases of independent claims, not secured by mortgage, in favor of the mortgagee against the mortgagor.

30. Alderson (Baron) remarks:[1] — "The right of tacking seems to have been established upon this principle: that where a mortgagee is in possession of the *legal estate* in two properties as a security for money lent on them, a court of equity will not allow the person entitled to the equity of re-

[1] White *v.* Hillacre, 3 Y. & Coll. 608.

demption to redeem either of them, unless he redeems both; and allows the mortgagee a lien on the whole for his whole debt." So, in Purefoy *v.* Purefoy,[1] it was stated by counsel as clear law, and not denied by the Court, that if a bill was brought to redeem two mortgages, and more money lent upon one of them than the estate was worth, the plaintiff should not elect to redeem one, and leave the heavier one unredeemed, but should take both or none. So, in Shuttleworth *v.* Laycock,[2] it is said: — "If there are two mortgages, and one is defective, if the mortgagor will redeem, he must take both." And, in Margrave *v.* Le Hooke,[3] a party having made two several mortgages of distinct estates, and died, and his heir claiming one of them as tenant in tail, and filing a bill to redeem the other; held, he should redeem both or neither. So, in Pope *v.* Onslow,[4] the assignee of a bankrupt filed a bill to redeem a mortgage of a manor, made by the bankrupt. The answer alleged, that the defendant first lent the bankrupt £200 on mortgage of a particular tenement, and afterwards £300 on the manor, which was of better value than the money due, and that the first mortgage was deficient in value. Held, the plaintiff could not redeem one without redeeming both. And although, in *ex parte* King,[5] Lord Hardwicke questioned the decision in Pope *v.* Onslow, as inaccurately reported; yet, in Titley *v.* Davis,[6] the same judge held, that a purchaser of one of two mortgaged estates must redeem both estates, even as to the debt of a second mortgagee of the other estate, who had filed a bill to redeem the first mortgage after the sale. So, in Roe *v.* Soley,[7] the assignee of a bankrupt moved to stay proceedings, on payment of principal, interest, and costs, due upon the mortgage in question; but it was objected, that the mortgagee held two other mortgages of other premises made by the bankrupt; whereupon the Court refused to order a redemption upon the terms above stated, and discharged the rule with

[1] 1 Vern. 29.
[2] Ibid. 245.
[3] 2 Vern. 207.
[4] Ibid. 286.
[5] 1 Atk. 300.
[6] 2 Y. & C. N. R. 399.
[7] 2 Bl. 726.

costs. So, in Cator *v.* Charlton,[1] Stokes mortgaged to Charlton for £1,400. Afterwards Charlton advanced, at different times, several other sums, and different premises were added, and made redeemable on payment of £1,900 and interest. These securities were registered; and afterwards the mortgagor assigned to the plaintiff the premises first mortgaged. The defendant, the mortgagee, admitted that there was no agreement that the first premises should be security for more than £1,400 and interest, but claimed that the plaintiff could not redeem without paying the whole sum due; and it was decreed accordingly. The same doctrine was held in the cases of Collett *v.* Munden, and Jones *v.* Smith.[2] And in Ireson *v.* Denn,[3] the Master of the Rolls said, he did not know why such a rule was ever adopted, but it had been in many cases; and he proceeded to decree accordingly.

31. The doctrine of these cases, however, has been severely criticized and somewhat qualified in recent decisions. (*d*) Thus, in the case of Hooper, *ex parte*,[4] Hopkins demised to Ford for years, by indentures of mortgage, subject to redemption on payment of £400. Ford afterwards made further advances, and, by an account stated, a further sum of £400 appeared to be due him. He died, and Hopkins became bankrupt. The petition of the executors of Ford, alleging that it was understood and agreed, that the second sum of £400 should be tacked, and a further mortgage executed for that sum, prayed a sale of the premises, and an application of the proceeds to the payment of both sums. Lord Eldon,

[1] Coote, 468.
[2] Ibid. 469.
[3] Coote, 425.
[4] 19 Ves. 477.

(*d*) In Demainbray *v.* Metcalf, Pr. Ch. 421, it is laid down, that if a sum of money be secured by mortgage, the mortgagor would not be admitted to redeem after the day of payment was elapsed, without also paying all that was due to the mortgagee on notes or simple contract. But Mr. Coote is of opinion, that prior to St. 3 & 4 Will. 4, a mortgagee could not have tacked a mere simple contract debt against a mortgagor; but since the passing of that statute, that a simple contract debt may be tacked against the heir or devisee, where there is not a devise for payment of debts. Coote, 471, 472.

after remarking upon the general subject of mortgaging by a mere deposit of title-deeds, proceeds to say :[1]—"I have more doubt upon my own decision, the addition of a second advance; but I put that upon the very ground, that the redelivery of the deed is an idle ceremony; if the original deposit is continued with an agreement for a further advance, that will do. I speak with doubt upon this; as the practice of conveyancers has always been, and the law is, that an original mortgage, vesting the legal estate by a contract in writing, cannot be added to by parol. There never was a case, where a man, having taken a mortgage by a legal conveyance, was afterwards permitted to hold that estate as further charged, not by a legal contract, but by inference from the possession of the deed. The other cases have gone far enough, indeed too far; and I will not add to their authority, where there are circumstances distinguishing the case before me." So the defendant mortgaged freehold and copyhold estates, and certain drainage bonds, to the plaintiff, and by the same deed his daughters mortgaged their freehold and copyhold estates, to secure £6,000 lent by the plaintiff to the defendant, the deed declaring, that without prejudice to any of the rights or remedies of the plaintiff, his heirs, &c., as between the defendant, his heirs, &c., on the one hand, and the daughters, their heirs, &c., on the other, the defendant, his heirs, &c., and his estates described in the mortgage, should be primarily liable for the £6,000. Some years afterwards, the defendant mortgaged the same estates to the plaintiff to secure another loan. Held, the plaintiff could not, as against the daughters, tack the second to the first mortgage, but they might redeem on payment of the £6,000.[2] So, in White *v.* Hillacre,[3] James Hillacre mortgaged Madgeon for years, to Chane, for £500. In 1808, by an indenture, to which the mortgagor was party, the mortgage was assigned to Clark. The mortgagor died, devising his estate (subject to the mortgage and other charges) to Thomas Hillacre.

[1] 19 Ves. 477 a, 479.
[2] Bowker *v.* Bull, 1 Sim. (New,) 29.
[3] 3 Y. & Coll. (Exc.) 597.

Thomas also owned Westhay, and in 1812 mortgaged it for a term to Clitsome, as security for a bond for £1,800, and died in 1815, owning the equity of redemption in Madgeon and Westhay; and having devised the estates to different persons. In 1816, Clark assigns to Clitsome the Madgeon mortgage. Clitsome having died, the plaintiff, her executor in trust, files a bill in equity against Henry Hillacre, a devisee of Thomas, his children and others, charging that the indentures of 1808 were executed with the defendant's approbation, and that Clitsome subsequently held Madgeon as security both for the balance of the £1,800 mortgage due at the time of the sale of Westhay, and for the £500 debt secured by Madgeon, and praying for an account, and that, in default of payment, Madgeon might be sold, and the proceeds applied, first to the £500 debt, and then to the Westhay mortgage. Held, the plaintiff had not the right of tacking, as the equity of redemption belonged to different persons, who became entitled under the will of Thomas, before the Madgeon mortgage was assigned to Clitsome; and hence the plaintiff, the representative of Clitsome, could not hold the Madgeon security, for the balance of the Westhay debt.

32. As the result of the cases, Judge Story states the law to be, that "Where a mortgagee has two mortgages on different estates, separately mortgaged to him by the mortgagor, and one of them is a deficient security for the debt, and the other is more than sufficient, the mortgagor and his heirs will not be permitted to redeem one, without redeeming the other. And if the equity of redemption of one of the estates be sold, the purchaser will not be permitted to redeem that estate (if the mortgage has become absolute at law), without redeeming both mortgages. The ground of this doctrine is, that he who seeks equity must do equity; and a court of equity will not assist any person in depriving a mortgagee of any security which he would have against the mortgagor."[1] (*e*)

[1] Story's Eq. § 1023, n.

(*e*) With regard to the right of bringing independent accounts between

33. From what has been already stated, it may be inferred as a general principle, that tacking is not allowed, except in favor of a *bonâ fide* purchaser, not having notice of the prior incumbrance when he took his original security. Hence the doctrine of tacking is not to be regarded as a rule of American law, as against mesne incumbrances *duly registered;* because not only are the registry acts held to be constructive notice, but the acts themselves, in effect, declare the priority to be fixed by the registration.[1] It is said: — "The doctrine of tacking is not admissible in our courts, it being inconsistent with the statute providing for the registry of deeds, which establishes a different principle of priority, and also the statute which prescribes the terms on which the mortgagor is entitled to redeem."[2] And even as between the parties themselves, the doctrine of extending the lien of a mortgage to other claims than those expressly agreed to be thus secured, or of imposing upon the mortgagor, as a condition of redemption, the payment of all debts due from him to the mortgagee; has been held not to prevail in the United States. More especially is this the case in a court of law, and where a legal process is brought to enforce the mortgage. (*f*)

34. In an early case in Pennsylvania,[3] the mortgagor became indebted to an assignee of the mortgage, on other ac-

[1] 1 Story's Eq. § 421, n.; 1 Hill. R. P. 400; Palmer *v.* Fowley, 5 Gray, 548. See Siter *v.* McClanachan, 2 Gratt. 280; Brown *v.* Wright, 4 Yerg. 66; Grant *v.* Bissett, 1 Caines's Cas. in Err. 112; Bank, &c. *v.* Finch, 3 Barb. Ch. 298.

[2] Per Wilde, J., Peabody *v.* Patten, 2 Pick. 520.

[3] Darrow *v.* Kelly, Dall. 142.

---

the parties into the redemption of a mortgage, it is said, that, if the right to the equity of redemption is in dispute, a tender will not stop the interest. If there is an open account between the parties, and a balance due the mortgagor; a tender of the sum due, after deducting such balance, will not stop the interest or prevent the mortgagee's recovering costs. Coote, 513, 514.

(*f*) The doctrine of tacking is said to have been first attacked and exploded in the case of Grant *v.* The U. S. Bank, (1 Caines's Cas. in Err. 112,) in which General Hamilton made a celebrated argument against it.

counts than the mortgage debt. In a *scire facias* upon the mortgage, it was contended for the plaintiff, that the mortgage should stand as security for the mortgagor's whole indebtedness to him; but the Court (Shippen President) held, that being a court of law, they could not assume chancery powers; that they had no authority to foreclose the equity of redemption, or to impose terms upon a mortgagor applying to redeem; but must be strictly governed by the act of the legislature which established this remedy. "This act expressly confines the remedy of the mortgagee to the recovery of the *principal and interest* due on the mortgage; and the proceedings under the law show the uniform construction of it. The *scire facias* is to show cause why the land should not be sold for payment of *the principal and interest* due on the mortgage. When judgment is obtained, the *levari facias* is to levy *the principal and interest money* only. There is no penalty, no judgment for a penalty, and we might as well refuse to stay proceedings in a suit on a single bill, till a subsequent debt was discharged, as in this case of a mortgage." [1]

35. It has been held in Massachusetts, that a subsequent mortgagee, upon a bill in equity, shall be allowed to redeem a prior mortgage, by paying the sum due thereon, though the defendant has another claim upon the property, subject to the plaintiff's mortgage; unless the defendant files a cross-bill to redeem the subsequent mortgage.[2] The Court remark:[3] — "The defendants' title under the mortgages made prior to the plaintiff's mortgage, and their title to the equity under Congdon by a conveyance from him subsequent to the plaintiff's mortgage, cannot merge so as to defeat the plaintiff's title." So the plaintiff brought a bill to redeem an equity of redemption sold on execution; and the defendant in his answer stated, that the plaintiff owed him other sums of money, that he was insolvent, and that the defendant purchased the equity merely that he might obtain sat-

[1] Darrow *v.* Kelly, Dall. 145.
[2] Green *v.* Tanner, 8 Met. 411.
[3] Green *v.* Tanner, p. 423.

isfaction of some of those debts, and submitted that the Court would not decree a reconveyance without payment of the balance due him. Wilde, J., says: — "It is very clear that the plaintiff is entitled to redeem on the repayment of the purchase-money and the interest. The right is expressly given by statute, and cannot be charged with other independent demands, according to the doctrine of tacking as adopted by the English courts of equity."[1] And upon the same principle, and for a stronger reason, any payment made upon the mortgage cannot be applied by the mortgagee to other claims. Thus, in the case of Hicks *v.* Bingham,[2] Pepoon mortgaged the demanded premises, with another tract, to the defendant, to secure five notes; and the equity of redemption came into the hands of the plaintiff. Pepoon afterwards assigned the other tract to Willard, and the defendant subsequently released it to Willard, and immediately afterwards entered upon the demanded premises for breach of condition, and had remained in possession ever since. The plaintiff afterwards paid to the defendant certain sums of money, which, with the amount paid by Willard and the rents of the estates, were alleged to cover the mortgage debt. Upon a bill in equity to redeem, the question was, whether the defendant was bound to apply the sum paid by Willard to the mortgage debt, or had a right to apply it to other claims against Pepoon. It was held, that it must be applied to the mortgage, having been received in consequence of the mortgage, and for a release of a part of the mortgaged premises.

36. In Tennessee, where a person borrowed money, and secured his indorsers by a deed of trust; and he afterwards borrowed money with the same indorsers, applied it in part payment of the former debt, and died: held, the dower of the widow was chargeable with the unpaid balance in the deed of trust, but the indorsers could not *tack* to the deed the subsequent debt.[3] So in Kentucky, a mortgage was

[1] 3 Pick. 48. See Palmer *v.* Fowley, 5 Gray, 545.

[2] 11 Mass. 300.

[3] Greer *v.* Chester, 7 Humph. 77.

given to A. by B., dated in 1795. C. became assignee of a lien on the land, created by B. in 1802. Subsequently, A. obtained a decree for an alleged balance due on his mortgage. C. obtained an injunction against the decree, alleging that the debt was wholly or nearly paid, in answer to which A. relied on other advances made on the faith of the mortgage. Held, such advances upon simple contract on land could not be *tacked* to the prejudice of C.[1] So, in Illinois, a subsequent mortgagee has priority of advances made by the former mortgagee, having notice of the second mortgage.[2] So in Vermont it is held, that, where the assignee of a mortgage which has become due, brings an action upon it, and holds another one which was not due at the commencement of suit; the mortgagor may redeem upon payment of the former.[3] (*g*)

37. In some of the States, however, the doctrine of the English law seems to have been adopted or recognized. Thus in Connecticut, in the case of Scripture *v.* Johnson,[4] the plaintiff mortgaged to secure a note for fifty dollars.

[1] Hughes *v.* Worley, Bibb, 200. But see Downing *v.* Palmateer, 1 Monr. 64; Hardin, 6; 1 A. K. Mar. 287; 7, 401.

[2] Frye *v.* Bank, &c., 11 Ill. 367.

[3] Lamson *v.* Sutherland, 13 Verm. 309.

[4] 3 Conn. 211.

(*g*) Mortgage to secure a money bond. To a suit for foreclosure, the defendants answered, that the bond and mortgage were made, to secure judgments in favor of third persons against the mortgagor, assigned to the mortgagee, which had since been satisfied by execution sales of other property of the mortgagor. Proofs were taken in support of the defence, and the plaintiff then offered evidence of payments made by him for the mortgagor since the date of the bond and mortgage, and other judgments against the mortgagor, since assigned to the mortgagee. Held, under the pleadings, the plaintiff could not have a decree for a sale to raise the latter sums. Hopper *v.* Sisco, 1 Halst. Ch. 343. Two mortgages, and a subsequent judgment against the mortgagor in favor of the first mortgagee, who purchased the equity of redemption at a sale under the judgment, and brings a bill against the second mortgagee to foreclose. Held, he could not require payment of the judgment. M'Kinstry *v.* Mervin, 3 Johns. Ch. 466; acc. Burnett *v.* Dennison, 5, 35; Tanner *v.* Wells, 8 Ham. 136.

The note and mortgage were assigned, and the assignee brought ejectment against the plaintiff, recovered judgment, and took possession under an execution. The plaintiff was also indebted to another person by bond, who brought a suit upon it, and recovered judgment and execution, and assigned the execution to the assignee of the mortgage. The assignee levied the execution upon the mortgaged premises by appraisement in the name of the original obligee, who transferred the title to the assignee. The plaintiff brings a bill to redeem the mortgage. The Court say:[1] — "There is no doubt as to the right of the plaintiff to redeem the whole of the premises mortgaged; but as he who will have equity must do equity, it must be on condition not only of paying the sum charged upon the land, but the debt collaterally due to the mortgagee." So it has been said by the same Court: "Whenever he (the mortgagor) brings a bill to redeem, the rule, that he who seeks equity must first do equity, will be applied. And hence it is, that if the mortgagor owe a collateral debt to the mortgagee, he will not be entitled to redeem, without paying such debt, as well as that secured by the mortgage."[2] And in the same case[3] it was held, in analogy to the doctrine of tacking, and upon the general principle, that he who seeks equity must first do equity, that an execution creditor of the mortgagor should not be allowed to redeem, where his claim was founded upon the accidental omission of the word *heirs*, in a trust conveyance from the mortgagor, and the consequent alleged transfer of only a life-estate instead of a fee by such deed. So, in a late case, it is held, that a mortgagee may take another mortgage, which will be valid against an intervening incumbrance implied by equity, of which he had neither actual or implied notice; like that of a surety in the note secured by the first mortgage, where the note is in form a joint and several one.[4]

38. In Maryland, the following distinctions are made: —

[1] 3 Conn. 213.
[2] Chamberlain *v.* Thompson, 10 Conn. 251.
[3] 10 Conn. 251.
[4] Orvis *v.* Newell, 17 Conn. 97. But see Osborn *v.* Carr, 12 Conn. 195.

"If a mortgagor goes into chancery to redeem, upon the axioms of equity above mentioned," (that he who seeks equity must do equity, and a multiplication or circuity of action should be avoided,) "he will not be permitted to do so, but upon payment not only of the mortgage debt, but of all other debts due from him to the mortgagee. But if the mortgagee seek a foreclosure in chancery, the mortgagor will be permitted to redeem upon payment of the mortgage debt only, no matter to what amount, on other accounts, he may stand indebted to the mortgagee. (*h*) And if a subsequent mortgagee or judgment creditor file a bill to redeem, he will be permitted to do so upon the payment of the mortgage debt alone."[1] And in another case,[2] Bland, Chancellor, says: — "Where a mortgagee has made further advances to the mortgagor, and taken his bond, binding himself and his heirs to secure payment, the mortgagee may tack such bond debt to his mortgage as against the heir or devisee of the mortgagor, who shall not be allowed to redeem without paying the bond as well as the mortgage debt. This, however, is solely a matter of arrangement to prevent circuity of suits; for, in natural justice, the claim has no foundation. But this tacking of the bond debt to the mortgage is never allowed, in any case, to the prejudice of creditors, whose claims as to the bond debt, are of equal degree." (*i*)

39. In Virginia, the doctrine of tacking seems to have been recognized.[3] Thus, where a married woman, under a power in a marriage settlement, had given a mortgage on her separate estate, to secure a debt which she had contracted, and afterwards obtained a further loan from the mortgagee;

[1] Per Dorsey, J., Lee *v.* Stone, 5 G. & Johns. 21, 22; Chase *v.* M'Donald, 7 Har. & J., 160.

[2] Coombs *v.* Jordan, 3 Bland, 330.

[3] Robertson *v.* Campbell, 2 Call, 362.

(*h*) This distinction is said to run through all the cases on the subject of tacking. 2 Greenl. Cruise, 147, n. 1.

(*i*) A statute of this State provides, that a mortgage is valid only for what appears upon the face of it. Md. L. 825.

upon a bill filed by her trustee to redeem, held, she must pay the latter debt, if the interest of third persons was not affected.[1] So, in Ohio, where a party purchased lands, sold under a decree to satisfy a mortgage, for a sum exceeding the amount decreed; held, he might apply the surplus in his hands to the redemption of an elder mortgage.[2] So, in South Carolina, where a mortgagor comes into equity to redeem, and the mortgage would not be treated as such at law; he must pay all that is due the mortgagee, on any account, in order to redeem.[3] So, in Kentucky, in order to redeem, it is held that the mortgagor must pay all equitable as well as legal claims against him, and must, therefore, pay subsequent advances made by the mortgagee.[4]

40. Upon this subject, Mr. Greenleaf makes the following remarks: — "The doctrine of *tacking*, though now established in England, is there taken with this most important qualification, that the party who seeks to avail himself of it is a *bonâ fide* purchaser, without notice of the prior incumbrance, at the time when he took his original security; for if he then had such notice, he has not the slightest claim to the protection or assistance of a court of equity."[5] He proceeds further to remark as follows, with more particular reference to the application of the doctrine of tacking in the case of *heirs*, who, by the English law, are directly bound by the bond debts of the ancestor: — "In the settlement of estates, it is a cardinal rule of American law, that all the property of the deceased is charged as a trust fund for the payment of his debts. The personalty is first to be exhausted, after which the executor, on application to the proper court, obtains license to sell all or so much of the real estate as may be necessary to pay the remaining debts; the proceedings being regulated by statutes. Ordinarily, therefore, remedy can be had in the first instance, only against the executor or administrator; the heir being

[1] Woodson *v.* Perkins, 5 Gratt. 345. But see Colquhoun *v.* Atkinson, 6 Munf. 550.
[2] Cowles *v.* Raguet, 14 Ohio, 38.
[3] Walling *v.* Aikin, 1 McMul. Ch. 1.
[4] Reed *v.* Landsale, Hardin, 6; Ogle *v.* Ship, 1 A. K. Mar. 287; Nelson *v.* Boyce, 7 J. J. Mar. 401. See Bibb, 200.
[5] 2 Greenl. Cruise, 141, n.

liable only in regard to those debts, for which no action could have been had against the personal representatives within the period mentioned in the statutes limiting such actions. Royce *v.* Burnell, 12 Mass. 395; Webber *v.* Webber, 7 Greenl. 127. The land descends to the heir, upon the death of the ancestor; his title being liable to be divested by a sale by the executor or administrator, as above stated. Gibson *v.* Farley, 16 Mass. 280. *If he should apply to redeem a mortgage of his ancestor*, in those States in which statute provisions exist, entitling the mortgagor to redeem on payment of the mortgage-money, it is conceived that the doctrine in the text (to wit, that the heir of the mortgagor cannot redeem a mortgage made by the ancestor, without paying off the money due upon a bond, for another debt) could not be applied to his case. But in all other cases where the redemption of the land would immediately constitute it assets in the hands of the heir, in respect to which he would be liable. to the same creditor on the obligation of his ancestor, the principle in the text, of avoiding circuity of action, would doubtless be applied by a court of equity here, as in England." [1]

41. Somewhat analogous to the practice of *tacking*, and indeed often spoken of in the books under that name, is the alleged right of a mortgagee to hold his mortgage as security for advances or liabilities, made or incurred subsequently to the date of the mortgage, but by virtue of an express provision contained therein, or an express agreement concurrent therewith. It is this last circumstance, which constitutes the fundamental distinction between these two rights and privileges of a mortgagee; *tacking*, in the strict sense of the term, being wholly founded in a construction of equity, while the right to hold land mortgaged as security for future demands rests entirely or chiefly upon the agreement of the parties. (*j*)

[1] 2 Greenl. Cruise, 142, n. 1; Elvy *v.* Norwood, 11 Eng. Law & Eq. 224.

(*j*) See Chase *v.* M'Donald, 7 Har. & J. 160; Murray *v.* Barney, 24 Barb. 336. See also 4 Kent, 175; 1 Hilliard, R. P. 401; Watson *v.* Dickens, 12

42. The question, of the validity of a mortgage to cover future advances or liabilities, may arise under several different aspects. One inquiry is, what language in the deed itself, or what evidence, independent of the deed, is necessary and sufficient to create such a security. There is also a manifest distinction, between the principle of making a mortgage to be a security for subsequent debts as between the parties themselves, and that of giving it the same extended operation as against third persons, holding other liens upon the estate. So also the question arises, in connection with such adverse claims, how far the subsequent incumbrancers are bound by the notice arising from registration; and whether the first mortgagee shall hold for advances made after the making and recording of the second mortgage. Most of the cases upon this subject have turned upon the conflicting rights of mortgagees, claiming under such a mortgage, on the one hand, and general creditors of the mortgagor, alleging that the conveyance was *per se* invalid or fraudulent, or subsequent mortgagees of the same property, on the other. (*k*)

Sm. & M. 608; Craig *v.* Tappin, 2 Sandf. Ch. 78; Quinebaug, &c. *v.* French, 17 Conn. 129; Coote, 441: Clark *v.* Bull, 2 Root, 329; Torrey *v.* Bank, &c. 9 Paige, 649; U. States *v.* Hooe, 3 Cranch, 73; North *v.* Crowell, 11 N. H. 251; McDaniels *v.* Colvin, 16 Verm. 300; James *v.* Morey, 2 Cow. 246; Beekman *v.* Frost, 18 Johns. 544; Van Wagner *v.* Van Wagner, 3 Halst. Ch. 27; Mobile, &c. *v.* Talman, 15 Ala. 472; Whiting *v.* Beebe, 7 Eng. 421; Utley *v.* Smith, 24 Conn. 290; Huntington *v.* Cotton, 31 Miss. 253; Rowan *v.* Sharps' ac. 29 Conn. 282; Seaman *v.* Fleming, 7 Rich. Eq. 283; Bayler *v.* Commonwealth, 40 Penn. 37. It is held in a late case, that, where the mortgage is to secure all debts, it is proper, upon a bill to redeem, to examine all antecedent dealings not shown to have been settled. Williamson *v.* Downs, 34 Miss. 402. Also, that a mortgage to secure future advances to a specified amount is a valid security as against subsequent incumbrances, for all advances made up to the time of such incumbrances. Bell *v.* Fleming, 1 Beasl. 13; S. C. Ibid. 490. And it is not necessary that the mortgage should be expressed to be security for future advances. Ibid.

(*k*) Chancellor Kent says, (4 Comm. 136, n. *a*,) "In the Roman law, the mortgage could be held as a security for further advances. The mortgagee

43. The general doctrine has been stated by eminent judges, as follows: — "The giving collateral security, to indemnify against liabilities to be incurred thereafter, is liable to some suspicion on the ground of fraud; but there is no objection to such a transaction, if it be explained and proved to be fair." [1]

44. "A mortgage made *bonâ fide* for the purpose of securing future debts, expected to be contracted, in the course of dealings between the parties, is a good and valid security." [2]

45. "In many cases a subject pledged for a debt may be considered as a security for further loans. I see no possible objection to it, if no intervening right exists, to prevent the justness of the application of the rule, and the plaintiff has no such intervening equity. It was a rule of the civil law, as was well shown by the Supreme Court of Massachusetts, in Jarvis *v.* Rogers, (15 Mass. 389,) that if the debtor pledged property to secure a debt, and afterwards another debt was contracted, the creditor might retain for both debts, provided there was nothing to negative the presumption of an implied contract that the pledge should be so applied. In the present case, the deed being absolute in its terms, and the defeasance by agreement resting in parol, the application of the deed, as a security for future responsibilities, of whatever kind, becomes more easy and flexible; and, as between parties, it is perfectly plain that it ought to be so held. It is only when the rights of third persons are prejudiced by want of notice, &c., that the extension of the security is prevented." [3] (*l*)

[1] Per Putnam, J., Gardner *v.* Webber, 17 Pick. 414. See Atkinson *v.* Maling, 2 T. R. 462; Edmonds *v.* Crenshaw, 1 McC. Ch. 265; Hendricks *v.* Robinson, 2 Johns. Cha. 283; U. States *v.* Hooe, 3 Cranch, 73; Conard *v.* Atlantic, &c. 1 Pet. 448; 2 Cow. 246; Johnson *v.* Bourne, 2 Y. & Coll. 268; Lyle *v.* Ducomb, 5 Binn. 585; Booth *v.* Barnum, 9 Conn. 286.

[2] Per Wilde, J., Commercial, &c. *v.* Cunningham, 24 Pick. 274.

[3] Per Kent, Chancellor, James *v.* Johnson, 6 Johns. Cha. 429.

was allowed to tack subsequent debts, in the case of the mortgagor seeking redemption, though this was not permitted to the extent of impairing the rights of intermediate incumbrancers."

(*l*) In Shepard *v.* Shepard, 6 Conn. 41, the restriction upon the right to

46. And a mortgage, really given to secure future advances, or as a general security for future balances, may be taken in the form of a mortgage for a specific sum, sufficient to cover the floating debt intended to be secured.[1] Whittlesey, V. C., says: — "A mortgage may unquestionably be taken and held as a security for future advances and responsibilities; but it is contended that (the principle) is only applicable when the mortgage upon its face provides for security for

[1] Bank, &c. *v.* Finch, 3 Barb. Ch. 293.

---

hold property mortgaged, as security for future advances, was thus expressed: — "No creditor, on inspecting the record, can know whether there is any lien on the premises, except eight hundred dollars, nor be furnished with any means of information on the subject." There is peculiar ground for suspicion, where the mortgage is really made to secure future advances, but does not purport to be given for that purpose. In such case, strict proof of consideration will be required. Craig *v.* Tappin, 2 Sandf. Cha. 78. In the same case, such a mortgage was held to be effectual for the amount advanced prior to the second mortgage, though the first mortgagee knew of the mortgagor's intention to make the second mortgage, to secure a pre-existing debt; but not for advances made subsequent to the second mortgage. Ibid. It is held in Illinois, that a mortgage, taken to secure future advances, is valid, although it does not show upon its face the real character of the transaction. In such a case, the mortgagee can only recover the amount actually due at the date of the sale of the equity of redemption. Collins *v.* Carlile, 13 Ill. 254. In Virginia, a mortgage to secure all debts due, and all suretyships of the mortgagee for the mortgagor, is a valid security for liabilities existing *at the time*. Vanneter *v.* Vanneter, 3 Gratt. 148. In Ohio, where a mortgage contains a provision to secure future advances, a second mortgage will have precedence, to the extent of all advances made after it is recorded. Spader *v.* Lawler, 17 Ohio, 371. A mortgage absolute on its face, but actually in trust, and the trust declared by a deed to lead uses, secured to the mortgagees, K. and S., their debts due from the mortgagor, their future advances to him, in payment of existing claims, and secondly, to A., B., C., and D., their debts at the time of execution of the mortgage, and to E. $100. Held, that the claim of S. existing at the time of the mortgage had priority over the future advances of K. Also, that the mortgagee was entitled to payment of his advances and his payments to protect the trust fund, before any payments made to A. Speer *v.* Whitfield, 2 Stockt. 107.

future advances and responsibilities. This mortgage is taken to secure $30,000 stated therein to have been paid by the mortgagee to the mortgagor; and it is recorded for that sum, which is all that the record expresses. If there had been no money actually paid, would the mortgagor be prohibited by his signature to the instrument from showing that fact by parol? If the mortgagee had not advanced the money until three months after the execution of the mortgage, would he be prohibited from showing this fact by parol? The parol evidence was admissible, not for the purpose of explaining the written instrument, but for the purpose of establishing the fact, that credit had been given to Finch, upon the several discounts for him on the faith of the mortgage. Here is a mortgage, the record of which is notice to all of an incumbrance to the extent of $30,000. The holder of that mortgage may advance upon it up to that amount, and may be secure in his lien to the extent of his advances within that amount; such having been the agreement between himself and the mortgagor; unless indeed this lien should be affected by the equities of subsequent incumbrancers or grantees, attaching previous to any advance." So, when mortgagees have indorsed bills in blank, and taken the mortgage as an indemnity, it is not affected by subsequent mortgages, though made before the bills are put in circulation.[1] Thus a mortgage to indemnify indorsers in three bills of exchange for $4,000 each, indorsed in blank, and delivered to the mortgagor to raise funds with, is valid.[2] Or a mortgage to indemnify the mortgagee against future indorsements for the mortgagor; as against a judgment recovered after such indorsements.[3] And if the mortgage is given to secure one who is bound to accepts drafts for the mortgagor, the lien attaches from their acceptance or negotiation.[4] So a mortgage, to secure future loans within a limited amount and time, covers a loan made within the

[1] Burdett *v.* Clay, 8 B. Mon. 287.
[2] Ibid.
[3] Kramer *v.* Bank, &c. 15 Ohio, 253.
[4] Choteau *v.* Thompson, 2 Ohio, N. S. 114.

time, although a preceding one had been made and repaid.[1] Though, on the other hand, a mortgage to secure advances and credits, to be made within a time limited, secures none made afterwards;[2] nor will a mortgage secure advances made after a bill is filed by other creditors.[3] So in case of mortgage to secure "also what I may owe him on book"; at the making of the mortgage, there being no subsisting account between the parties, the condition was held to apply to future accruing accounts.[4] So, where a bond and mortgage were made by an only son to his father, nominally to secure a certain sum of money; and it appeared that the son was a young man, just entering the army, and that the father had lived more than fifteen years, and not demanded or received any interest, but during the whole time maintained the son: held the bond should be taken as a running security, and the son charged only for the amount admitted by him to have been received, in the absence of other evidence.[5] (*m*) But where a mortgage was given to

[1] Wilson *v.* Russell, 13 Md. 494.
[2] Miller *v.* Whittier, 36 Maine, 577.
[3] Seaman *v.* Fleming, 7 Rich. Eq. 283.
[4] McDaniels *v.* Colvin, 16 Verm. 300.
[5] Melland *v.* Gray, 2 Y. & Coll. 199.

(*m*) A statute of New Hampshire provides, (in substance,) that a mortgage shall stand as security, only for such claims as are expressly stated therein. In the case of New Hampshire Bank *v.* Willard, 10 N. H. 210, on the 16th of August, 1836, a mortgage was made by the defendant, conditioned to pay the plaintiff $5,000 on or before August 16, 1838, on payment of which "this deed, as also a certain bond," &c., "shall be void." The condition of the bond was to pay to the bank all discounts of the mortgagor on "notes, &c., made, &c., on or before August 16, 1838," or which being now made, &c., shall before said day be discounted by said bank; and indemnify the bank against all damages, &c., arising therefrom. At the making of the mortgage, the plaintiffs held a note for $6,200 signed by the defendant and another, which had been discounted for them. September 3, 1836, the defendant gave his note to the bank for $3,100, being his half of the other note; and the other maker also secured his part of the note, which was given up. August 16, 1838, the defendant was indebted to the plaintiffs upon several notes made subsequent to the mortgage. Held, the mortgage

indemnify the mortgagees from all liabilities which they had at any time theretofore contracted, to and for the mortgagor

---

stood as security for the new note of $3,100, but not for the subsequent notes; the statutory provision against subsequent liabilities applying as well between the mortgagee and mortgagor, as in reference to third persons.

In Leeds *v.* Cameron, 3 Sumn. 492, it was contended, that the common law had been changed in New Hampshire by the following legislative provision (being the same above referred to): — "No title, &c., shall be incumbered by any agreement, unless such agreement or writing of defeasance shall be inserted in the condition of said conveyance and become part thereof, stating the sum or sums of money to be secured, or other thing or things to be performed." In this case, the condition was to pay "all sums which now are or may be owing to, &c., from, &c., on account or otherwise," with interest. The mortgage also secured certain specified notes. It was held by Story, J., that such was not the operation of the act in question. He says (Ibid. 492, 493): — "If we were to give to these words the restricted construction contended for, the statute would defeat all mortgages, given as indemnity; — for it could not appear in certainty upon such mortgages, what loss or injury the surety or other person would sustain. So, if a father should receive from a son a mortgage to provide suitable maintenance during his life, the conveyance would be void; no mortgage would be good, given to secure *all debts due* to the mortgagee, or indeed any debt the amount of which was not specifically ascertained and stated. The whole language is perfectly satisfied, by considering it to require the nature and extent of the claim to be so far set forth, as to leave no doubt as to its identity; to require that all mortgages should be in writing, as it would enable creditors in all cases to ascertain whether an estate granted was absolute or conditional, and would cut off many of the temptations to create secret, undefined trusts, or fraudulent and collusive securities." In the same case, however, it was further held, that this statute avoids all mortgages for the payment or security of any moneys or other things, which were not a matter of right and positive obligation between the parties at the time of the mortgage; and that a mere provision for prospective advances or accounts, resting in the discretion of the parties or either of them, could not be thus secured. In Gordon *v.* Graham, 7 Vin. 52 E. Pl. 3; 2 Eq. Cas. Abr. 598, a mortgage was made to secure a sum already lent, and all sums which should afterwards be lent or advanced. The mortgagor then made a second mortgage, to one having notice of the first, and the first mortgagee, having notice of the second mortgage, advanced a further sum. Lord Cowper decreed, that the second mortgagee should not redeem, without paying the whole sum advanced by the first mortgagee; saying, "it was

" either as surety, indorser, guarantor, or otherwise, whether now due or yet to grow due, and from all damages, costs,

---

the folly of the second mortgagee with notice to take such security." A mortgage dated on the 18th of May contained the following proviso: — " Whereas the mortgagee has indorsed for the mortgagor a note for $1,000, and has agreed to indorse $1,000 in a note or notes hereafter, when thereto requested," if the mortgagor shall pay said notes, the deed to be void. On the 16th of June, the mortgagee indorsed a note for the mortgagor for $1,000, and was afterwards compelled to pay it. In November, the mortgagor made another mortgage to a *bonâ fide* creditor, against whom the former mortgagee brings a bill for foreclosure. Held, the former mortgage was a valid security for the second note. Hubbard *v.* Savage, 8 Conn. 215. In the case of Crane *v.* Dewing, 7 Conn. 387, a mortgage was conditioned, that if the mortgagor shall pay the mortgagee the sums to be advanced by the latter, according to an agreement mentioned in a certain bond of even date from the mortgagor to the mortgagee; and fulfil every other agreement mentioned in said bond, and build the bridge therein mentioned, and do all other things contained therein; the deed and bond to be void. After a second mortgage to another person, advances were made by the first mortgagee to the mortgagor. Held, the mortgage should stand as security for such advances. Mortgages, from parties in failing circumstances, to secure the mortgagee for certain liabilities; the conditions setting forth, that the mortgagee was accommodation indorser and signer for the mortgagors on sundry notes, drafts, and bills of theirs to the amount of $50,000, which were then maturing; of which they could not give a particular description, but which it belonged to them to pay and meet. When the mortgages were made, it was necessary, for the mortgagees' security, that they should be given immediately, and before the notes, &c., could be more accurately described; they not being then in possession of either of the parties. Held, the mortgages were not void for uncertainty, but were valid against subsequent incumbrancers. Lewis *v.* De Forest, 20 Conn. 427. Mortgage to two partners, to secure a claim " on book, for goods sold, &c., in about the sum of $5,000," as specified in the deed; and to another person to secure him as indorser, &c., to the amount of $50,000. The real claim of the partners was $2,505.85; and the indorser's liabilities exceeded $50,000. The latter received other securities at the same time, but not equal to the amount of his indorsements. Held, the partners took *pro ratâ*, and only in the proportion of their real claim to $50,000; and that their claim was specified with sufficient certainty, as against subsequent incumbrancers. Ibid. In September, 1846, the defendant took a mortgage to secure certain notes. The mortgagor, to secure a note of $200, made a subsequent mortgage to

and charges on account of the same;" this condition was held so vague and general in its terms, that, as to subsequent creditors, it was fraudulent and void.[1]

[1] Youngs *v.* Wilson, 24 Barb. 510. See Utley *v.* Smith, 24 Conn. 290.

---

the plaintiff, dated January 17, 1848, but delivered and accepted January 18th. Before the 18th the mortgagor was not indebted to the plaintiff, but the securities were given and taken under an agreement that the plaintiff should open an account with the mortgagor, and sell him goods, and that the latter should make payments which would keep the amount due not more than $200. An account was immediately opened, and goods sold to the amount of $103. The account continued about nine months, the balance, at the closing of it, being $180, with interest, and having never equalled $200. After the second mortgage, the mortgagor conveyed his equity of redemption to the defendant, who gave up the mortgage notes. The plaintiff brings a bill to redeem. Held, the plaintiff's mortgage took effect from the delivery; that the securities given to the plaintiff, and the sale of goods made at that time, constituted parts of one transaction; that the condition of that mortgage was truly expressed, and with sufficient certainty; that the defendant did not stand as a purchaser for valuable consideration, but as a mortgagee, with the equity of the mortgagor in the first mortgage extinguished, giving the plaintiff, whose right was unimpaired, a title to redeem; and that the defendant had no equity superior to that of the plaintiff. Mix *v.* Cowles, 20 Conn. 420. Mortgage, conditioned nominally upon the payment of a certain sum, but really to secure different sums then due, proposed subsequent advances, and liabilities to be incurred to an uncertain amount. It appeared that there was no fraud in the transaction. Held, although the incorrect statement of the true condition rendered the mortgage suspicious, yet, being proved fair, it should stand as security for all advances made upon the faith of it, as against all persons who were not injured and deceived by the misrepresentation; but not for advances made after notice of a subsequent conveyance by, or incumbrance against, the mortgagor. Shirras *v.* Caig, 7 Cranch, 34, 50, 51. A mortgage was made to secure a note, given by the mortgagor for the full amount of a debt due the mortgagee, and of the liability of the latter for the former as a surety. The next day, before any payment by the mortgagee as surety, the mortgagor assigned his property for the benefit of creditors. Held, the mortgage was a valid security for the debt due to the mortgagee. Sanford *v.* Wheeler, 13 Conn. 165. Mortgage, conditioned to pay any subsequent account which might accrue from the mortgagor. A second mortgage having been made of the same premises and duly recorded, held, the first should stand as

47. Where a mortgage is made in part to secure future debts, the Court will not interfere in appropriating the proceeds of sale to the prejudice of the mortgagee, and in favor of a surety for the mortgagor. Thus, where a mortgage was made to secure payment of all sums then owing, or afterwards to become due, from the mortgagor to the mortgagee, upon any existing or future note, of which the mortgagor

---

security for any balance which might become due to the mortgagee, unless he were expressly notified by the second mortgagee of his incumbrance, and that he must make no further advances upon the mortgage. McDaniels *v.* Colvin, 16 Verm. 300. In New York, where a judgment may be confessed, as well as a mortgage made, to secure future indebtedness, it has been held, that the judgment shall take precedence of a subsequent mortgage, although the advances be made by the judgment creditor after registration of the mortgage, unless such creditor have actual notice of it. The recording act declares, that every conveyance not recorded shall be void against any *subsequent* purchaser in good faith and for a valuable consideration, whose conveyance shall be first duly recorded. (2 Rev. Sts. 3d ed. 40.) The record is constructive notice to a subsequent purchaser, but in nowise affects a prior purchaser or incumbrancer. It is *prospective*, not *retrospective*, in its operation. Truscott *v.* King, 6 Barb. 346; Stuyvesant *v.* Hall, 2 Barb. Cha. 151. A second mortgagee had a judgment execution, and levy on the land for the mortgage debt; and it was agreed that he should hold the mortgage and judgment to secure him as a surety on certain notes. Held, he should thus hold them against a subsequent incumbrancer; and that the holder of the notes was also entitled to the benefit of the security in the same way. Skillman *v.* Teeple, Saxt. 232. In a suit upon a mortgage, given to secure future advances and acceptances, the plaintiffs having produced certain drafts accepted by them; held, that though ordinarily the acceptor is presumed to have funds of the drawer in his hands, so that the acceptance is in payment, not in creation of a debt, yet in this case, under the phraseology of the mortgage, the contrary was to be presumed, and therefore the burden was on the defendant to show that he drew against funds, not against an expectation of accommodation acceptances. Lewis *v.* Wayne, 25 Geo. 167. Property was conveyed to secure certain debts, the surplus on the sale to go to the grantor. Afterwards the grantees paid more money on the grantor's order. Held, that these payments were advances of part of the surplus, and, therefore, that the grantee should be allowed them, on a bill to redeem, as much as if he were accounting for the surplus upon a sale. Williamson *v.* Downs, 34 Miss. 402.

might be drawer or indorser; and upon a sale of the premises the proceeds were insufficient to pay a note, for which there was no security but the mortgage: held, an accommodation indorser, upon a note discounted after the mortgage, could not require an equal distribution of the fund between both notes. The Court say: — "To this mortgage, Stansbury and the Union Bank alone were parties. Under it, at law, no right was acquired, no interest passed; upon it no action could be maintained but by the bank. The object of its execution was, not to indemnify drawers or indorsers, but to insure to the Union Bank the payment of all notes negotiated by them. 'Tis true, if the fund had been sufficient, those who were on his paper would, in equity, be protected from loss. But this was a consequence, not the design of his act. The attempt to sustain the claim of the appellee by the doctrine of substitution is equally untenable. Such relief is never extended to a security, but upon the assumption that the creditor's debt has been or is to be fully paid; that his further detention of the mortgaged property is against equity and good conscience." [1]

48. Where a mortgage was conditioned to pay "the several sums of money which he may, from time to time, owe, at the times appointed, &c., according to the terms and conditions of an article of agreement," &c., which agreement was not recorded; held, as the mortgage referred to the agreement, it was not necessary, as against a creditor who recovered a judgment while such agreement remained in force, that it should be recorded with the mortgage; the reference being sufficient to put him upon inquiry. The case does not distinctly find, whether any part of the goods referred to in the contract were furnished after the judgment was recovered, but the Court remark: — "He has no equity against the mortgagee, as to claims subsisting when the lien of his judgment attached;" implying that the whole debt was then subsisting.[2]

[1] Union Bank, &c. *v.* Edwards, 1 Gill & J. 346, 363, 364, 365.
[2] Garber *v.* Henry, 6 Watts, 57–59.

49. Where one of several partners mortgages his separate property for future advances, to be made to the firm, to a certain amount; the mortgage security will terminate at the death of any one of the partners, as to any advances not then made, unless the guaranty be clearly intended to be a continuing one.[1]

50. The rights of a subsequent mortgagee cannot be prejudiced by any enlargement of the liability of the mortgagor to the first mortgagee, growing out of the further relation between them of lessor and lessee. Thus the defendant purchased land subject to certain leases, and to secure the price gave the plaintiffs three bonds, payable without interest, with a mortgage of the land, and also a bond with interest; for non-payment of which interest the plaintiffs bring this bill to foreclose. It was agreed in writing, at the time of purchase, that the plaintiffs should receive the rents on the leases instead of interest upon the three bonds, the leases terminating at the times of payment of the bonds. The defendant made a subsequent mortgage, the second mortgagee having no notice of the leases, or of the arrangement between the plaintiffs and defendant, above referred to. Neither the leases, nor any assignment of them, nor the agreement as to the rents, were on record. The lessees continued to occupy and pay rent to the plaintiffs, till they surrendered the leases to the defendant, without notice to the plaintiffs, and the defendant paid rent to the plaintiffs, till a short time before the suit. The second mortgagee, until recently, knew nothing of the leases, or their surrender. Upon a foreclosure and sale of the premises, held, the plaintiffs could not be allowed to enlarge their demand beyond what it appeared upon the record, by receiving interest upon these bonds, in consequence of the arrangement as to rents. The Court say: — "The bank is not chargeable with notice of the leases, or of the agreement of the mortgagor to apply the rents to the plaintiffs as a substitute for interest. It is the policy of the regis-

[1] Bank, &c., *v.* Christie, 8 Cl. & Fin. 214.

try act, that a subsequent incumbrancer should be able to ascertain *with certainty* the extent of the prior incumbrance; and if moneys not mentioned in the bond or mortgage can be covered by them, when the rights of a subsequent mortgagee are interposed, and to whom no fraud or negligence is to be imputed, it would go to weaken very essentially the value of mortgage security." [1]

51. A mortgage was made to the factor of the mortgagor, to secure an existing debt, also future advances to a certain amount. The mortgagee advanced beyond that sum; and the principal made consignments to him, the proceeds of which were credited in general account. Held, they should be first applied to that portion of the mortgagee's claim which was unsecured.[2]

[1] St. Andrew's Church *v.* Tompkins, 7 Johns. Ch. 14, 16.
[2] Johnson's, &c. 37 Penn. 268.

CHAPTER XIII.

ESTATE OF THE MORTGAGEE. — CONCURRENT OR SUCCESSIVE MORTGAGES OF THE SAME PROPERTY. — RIGHTS OF PARTIES COLLATERALLY INTERESTED IN THE MORTGAGED ESTATE.

1. Concurrent mortgages.
2. Land subject to mortgages may be further mortgaged. General rights of subsequent mortgagees; when they become entitled to priority, &c.
23. Equitable application of estates subject to successive mortgages.
30. Rights of parties collaterally liable for debts secured by mortgage; sureties; subsequent mortgagees.
41. Mortgages of indemnity to sureties, &c.
68. Transfer of different estates, subject to one mortgage. Equitable apportionment of the mortgage debt.

1. Different mortgages of the same land may be made at one time; and, in general, it seems, unless affected by priority of registry, would give equal and concurrent rights to the respective mortgagees. If bearing the same date, and acknowledged at the same time, with a general agreement that one shall have priority of the other; the former is presumed to have been first delivered.[1] But in a late case it is held, that a mortgage for *the purchase-money* takes precedence of another mortgage executed at the same time, though both are entered for record at once. The former mortgage is regarded as part of one transaction with the deed, giving the mortgagor only an instantaneous seisin. And this construction is conformable to the presumed intention of all the several parties.[2] (*a*)

[1] Jones *v.* Phelps, 2 Barb. Ch. 440.
[2] Clark *v.* Brown, 3 Allen, 509. See New England, &c., *v.* Merriam, 2 Allen, 391; Van Rensselaer *v.* Stafford, Hopk. 569. See Ch. 1, s. 1, and n.; 4 Paige, 204; 23 Penn. 186.

(*a*) The assignment of one of two mortgages, which were made by the same person at the same time, gives precedence to the one assigned, even

2. A mortgagor may mortgage his equity of redemption, or, as it is commonly expressed, make a second mortgage of the land. (*b*) "Though mortgages are made, succes-

---

as against a subsequent assignee of the other. Van Rensselaer *v.* Stafford, Hopk. 569.

Where there are two mortgages to secure the same debt, the decree for foreclosure must order, that the parcel first mortgaged be sold first. And then the owner of the second parcel can stop proceedings, or, after a sale of his parcel, can redeem it, by paying what is due beyond the proceeds of the first sale. Raun *v.* Reynolds, 11 Cal. 14.

(*b*) See Kilborn *v.* Robbins, 4 Allen, 369. A mortgagee takes, subject to prior *judgment* liens; but they do not affect the validity of the mortgage. Fitzgerald *v.* Beebe, 2 Eng. 311. Where a mortgage and judgment are entered of record the same day, with nothing to show which was first recorded, they are payable *pro ratâ*. Hendrickson's, &c., 24 Penn. 363; Claason's, &c., 22 Ibid. 359. The mortgagee may legally purchase a judgment. Walthall *v.* Rines, 34 Ala. 91. See Taylor *v.* Maris, 5 Rawle, 51. Land, subject to the lien of an execution, may be mortgaged; and the mortgagor cannot interfere with the mortgagee's title, by ordering a sale of more than enough to satisfy the execution. Addison *v.* Crow, 5 Dana, 279. Conveyance, with warranty, of land subject to three mortgages, and also to a judgment prior to the first, of which the grantee had no notice. Upon this judgment an execution was issued, the land sold under it, and purchased by the plaintiff, and afterwards from him by the grantee. Held, the latter took the land discharged of the third mortgage. McCammon *v.* Worrall, 11 Paige, 99. Where a judgment is docketed against a mortgagor, between the time of giving the mortgage and its foreclosure by advertisement, and a *fi. fa.* issues after foreclosure, upon which the land is sold, and the purchaser tenders to the purchaser under the mortgage sale the amount of the mortgage, with the costs of foreclosure; the former cannot maintain ejectment against tenants of the latter. Post *v.* Arnot, 2 Denio, 344. Land being subject to two mortgages, a person advanced money to the mortgagor to pay the second, which was discharged, and the lender took a new mortgage, the premises being then subject to a judgment against the mortgagor, who had concealed the fact from the lender. Upon a bill to foreclose the first mortgage, the premises were sold. Held, that the surplus, after paying the first mortgage, should be applied to the last, the judgment creditors having neglected to present their claim. Burchard *v.* Phillips, 11 Paige, 66. In New York, a mortgage for purchase-money has priority of a judgment against the mortgagor, whether prior or subsequent to such mortgage. Prelinghuysen *v.* Colden, 4 Paige, 204. Land on which was a mortgage for the

sively, upon the same property, they are still regarded as mortgages."[1] So a mortgage may be made contingent upon

[1] Per Gholson, J., Justice *v.* Uhl, 10 Ohio St. 176.

---

purchase-money was sold for taxes, and A., the purchaser, gave his bond to the treasurer, for the use of the last owner of the lot, for the surplus over the amount due for taxes. B. had obtained a judgment against the owner of the land, and summoned A. as his garnishee. Held, the owner of the mortgage was entitled to the surplus under the Act of April 14, 1840, and that A. was bound to defend the interest of the mortgagee. Kelso *v.* Kelly, 14 Penn. 204. A mortgagee was compelled, for his own security, to satisfy a prior judgment against the mortgagor. Upon a sale of the property, held, he should receive from the proceeds the amount of the judgment, as well as the mortgage. Silver, &c. *v.* North, 4 Johns. Ch. 370. Land being subject to a mortgage and judgment, the owner of a part of it sold such part to the owner of the residue, "under and subject to the payment of the judgment and liens thereon," and took a mortgage back. The whole land was afterwards sold on execution against the vendee. Held, the vendor's mortgage should be paid from the proceeds of the whole lot, next after the first mortgage and judgment, in preference to the judgments against the vendee. Devor, 1 Harr. (Penn.) 413. Where a mortgagee, whose mortgage is the first lien on an estate, buys the same at a sale under a junior judgment, without any express stipulation between him and the sheriff; he stands like all other purchasers, and cannot require a deed from the sheriff, on crediting the amount of his bill in satisfaction of his mortgage. Crawford *v.* Boyer, 14 Penn. 380. Mortgaged premises were sold under a judgment subsequent to the mortgage, which was afterwards foreclosed, and the mortgage debt paid by the purchaser at sheriff's sale. Held, such purchaser should be protected against the purchaser under the mortgage, having notice of the sheriff's sale before his purchase was complete. Seymour *v.* Preston, Spears, Ch. 481.

A court of equity, where the case justifies it, may order a judgment to be paid out of mortgaged real estate, and direct the judgment to be assigned to the mortgagee, or direct the assignment to be made, if the mortgagee pays the claim out of his own funds. Watson *v.* Bane, 7 Md. 117.

Where there is the lien of a judgment, not sustained by levy within the year after the rendition of the judgment, but older than the lien of a mortgage, the mortgagee cannot protect himself against the prior judgment lien, by the purchase of a junior judgment levied within the year. Fitch *v.* Mendenhall, 17 Ohio, 578.

If the assignee of an equity of redemption acquires a title obtained under

the insufficiency of another mortgage.[1] So, where a third person took timber from land under mortgage, with the consent of the mortgagor and mortgagee, and with the common understanding that the avails should be appropriated to

[1] Trenchard *v.* Warner, 18 Ill. 142.

---

a judgment prior to the mortgage, and the mortgagor refunds to him the sum paid for the judgment, the title acquired under the judgment will be subordinate to the mortgage. White *v.* Butler, 13 Ill. 109. In equity, such title will be treated as if obtained by and in the name of the mortgagor. Ib. If the mortgagor, or a purchaser from him, pays off the mortgage, and it is discharged, there being a subsequent judgment on the premises, under which they are sold; the purchaser at the latter sale will take the premises discharged of the mortgage, and equity will not relieve the vendee of the mortgagor, there being no mistake of fact, fraud, or accident. Garwood *v.* Eldridge, 1 Green, Ch. 145.

Funds of a debtor, which arise from a sheriff's sale of property not mortgaged, cannot be applied, even with the debtor's consent, to mortgages, as against other judgments. Byass *v.* Bancroft, 22 Geo. 34.

A mortgage takes effect on delivery to the recorder for record. It has no effect as against judgment creditors of the mortgagor till such delivery. After delivery, the lien of such judgments only attaches to the equity of redemption, and the judgment creditor is in no better position than the mortgagor. Tousley *v.* Tousley, 5 Ohio, (N. S.) 78.

A mortgage given for the residue of the purchase-money, of the same date with the conveyance, duly recorded, has priority over judgments against the holder of the equitable interest anterior to the conveyance; and a sale upon a judgment entered subsequently to the mortgage does not divest its lien. Cake's Appeal, 23 Penn. 186.

A mortgage in common form, to secure payment of a bond for a sum certain, which bond is in fact given in consideration of a promise by the obligee to advance a similar sum, for the purpose of building on the mortgaged land, and in certain proportions to the progress of the buildings; has priority over mechanics' liens recorded subsequently to the mortgage, although before the advances were all made. Moroney's Appeal, 24 Penn. 372.

The assignee of a first mortgage may maintain a bill in equity, to restrain the prosecution of a writ of entry against him in a lower court, brought for the foreclosure of a subsequent mortgage, which mortgage includes another lot now owned by the assignee of the second mortgage, and liable to contribute to the mortgage debt. Kilborn *v.* Robbins, 4 Allen, 369. See, further, Kelly *v.* Perseverance, &c., 39 Penn. 148; Hahn's, &c., Ibid. 409.

the mortgage; held, they must be so appropriated, a prior mortgagee making no claim.[1]

2*a*. And the right of redeeming any number of successive mortgages may be mortgaged anew. More numerous and complicated questions in the law of mortgages probably arise from this source than from any other. The general principle is, that mortgages duly recorded have preference according to the order in which they were made; (*c*) that a second mortgagee stands in the place of the mortgagor, as to his right of redeeming the first mortgage; and so, in reference to further mortgages of the same property, each new mortgagee succeeds to the rights of his mortgagor. A mortgage being only a pledge, a subsequent mortgagee may elect, either to foreclose and bring an action against the mortgagor, or to redeem the prior mortgage.[2] If he join the first mortgagee as party defendant, in a suit to foreclose, he may have a decree of account and redemption of the first mortgage.[3] So, where a mortgagee is in possession for the purpose of foreclosure, and also owns the equity of redemption, a second mortgagee may bring an action against him for foreclosure; and under his execution may be put in temporary possession without an actual ouster of the defendant. And it seems a special form of judgment will be entered to preclude such ouster.[4] It is said, a second mortgagee has full power, by paying off the first mortgage and taking the entire control of the mortgaged premises, as against the mortgagor, to protect himself against any apprehended injury from the neglect of the first mortgagee to take and continue actual possession, so as to render the income

[1] Howe *v.* Russell, 36 Maine, 115.
[2] Savage *v.* Dooley, 28 Conn. 411; Norton *v.* Warner, 3 Edw. 106.
[3] Farwell *v.* Murphy, 2 Wis. 533; Blake *v.* Williams, 36 N. H. 39.
[4] Cronin *v.* Hazletine, 3 Allen, 324.

(*c*) So where an estate is purchased free from incumbrance, and the purchaser takes possession without payment; the purchase-money is considered as applied, so far as it will go, in payment of the incumbrances according to priority. Coote, 483; Greenwood *v.* Taylor, 14 Sim. 505; Smith *v.* Smith, 9 Beav. 80. See Mackenzie *v.* Gordon, 6 Cl. & Fin. 875.

of the premises available towards the discharge of the debt secured by the first mortgage. This would effectually secure him against any collusion between the first mortgagee and the mortgagor.[1](*d*) So a second mortgagee, paying the first for his own security, succeeds to his title, whether all or only a part of the mortgagors are personally bound for the debt.[2] So it is said, a second mortgagee of two estates, subject to prior distinct mortgages, may redeem either of them, and then foreclose as to that particular estate; and if he sue to redeem both the prior mortgages, he may have a decree to redeem both or either of them, and to foreclose the mortgagor accordingly.[3] So, where B. executed to A., at different times, two mortgages of separate parcels of land, to secure distinct debts; on a bill of foreclosure, brought by A. against B. and subsequent incumbrancers, held, A. was not entitled to a decree, foreclosing such subsequent incumbrancers of all right to redeem either mortgage, upon failure to pay both, but that they were entitled to redeem one of such mortgages, without the other.[4](*e*)

[1] Per Dewey, J. Charles *v.* Dunbar, 4 Met. 502. See Pomeroy *v.* Lathing, 3 Allen, 221.

[2] Weld *v.* Sabin, 20 N. H. 533.

[3] Coote, 470.

[4] Frink *v.* Branch, 16 Conn. 260.

(*d*) A subsequent mortgagee sought to set aside a purchase under a decretal sale in favor of a prior mortgagee, at which the latter had become the purchaser. The Court of Appeals allowed him to redeem upon terms; but, he having delayed to do so, the Chancellor afterwards refused to quash the sale and allow him to redeem. Held, on account of the delay and a subsequent compromise and pending litigation between the parties, the refusal was proper. Dale *v.* Shirley, 8 B. Mon. 524. In Alabama, a second mortgagee may either pay the first mortgage, and then file a bill to have a sale for payment of both mortgages, or he may file a bill for foreclosure without payment, making all necessary parties, and have a decree for sale to pay both. Cullum *v.* Erwin, 4 Ala. N. S. 452; Chambers *v.* Mauldin, Ibid. 477. In Michigan, a subsequent mortgagee may redeem, where the premises are sold upon a prior mortgage under the statute. Kimmell *v.* Willard, 1 Doug. 217.

(*e*) Where two successive deeds of trust are made to one trustee of the same property, but for different cestuis, and the trustee sells under the latter

3. Where a mortgagee has been compelled to pay an existing incumbrance, as well on the lands mortgaged to him as on other lands, the owner of such other lands will be decreed to pay him his proportion of such incumbrance.[1]

4. A mortgage was made to secure a void claim, and a subsequent mortgage, to another person, to secure a just debt; and the assignee of the right to redeem paid the first mortgage. Held, the last mortgagee could not recover of the first the money so paid.[2]

5. In England, upon the principle of *tacking*, to which reference has been already made, (*supra*, ch. 12,) a third mortgagee may gain priority over a second mortgagee, by buying up the first mortgage and tacking it to his own, thereby obliging the second mortgagee to redeem both in order to redeem one.

6. A second mortgagee succeeds to all the rights of the mortgagor, arising out of any special agreement between the mortgagor and the first mortgagee in relation to the land. Thus, if the mortgagor leased to the first mortgagee, who covenanted to pay rent, but refuses to pay it to the second mortgagee upon demand, not having paid it to the mortgagor; upon redemption of the first mortgage by the second mortgagee, the first mortgagee must account for the profits towards the payment of his claim.[3] While, on the other hand, as will be more fully explained hereafter, (see *Parties*,) a second mortgagee is not bound by proceedings between the first mortgagee and the mortgagor, to which he was not party.

7. By agreement of parties a subsequent mortgage may take precedence of a prior one. Thus, by an express statute, the State Bank was prohibited from taking a mortgage of

[1] Lyman *v.* Little, 15 Verm. 576.
[2] Ellsworth *v.* Mitchell, 31 Maine, 247.
[3] Newall *v.* Wright, 3 Mass. 138.

one; the grantor's equity of redemption passes, and, upon a bill to enforce the prior lien, the purchaser's title cannot properly be declared void. Graham *v.* King, 15 Ala. 563.

property already incumbered, to secure a loan; but the bank took a second mortgage, under a valid agreement between all parties, that it should have precedence of the first. Held, this agreement was binding on the mortgagor, and an execution purchaser of the equity took, subject to both incumbrances.[1] (*f*)

8. Where a prior incumbrancer contracts for a purchase of the land in discharge of his debt, and assumes the payment of a subsequent mortgage as part of the consideration; such purchase will operate as an extinguishment of his mortgage, and give priority to the subsequent mortgagee. Thus in the case of Brown *v.* Stead,[2] after two mortgages, the mortgagor charged the land with another debt to the first mortgagee. He afterwards entered into an indenture with the second mortgagee, setting forth that the latter had agreed for an absolute purchase of the land for a certain sum, being the amount of all the debts, from which he was to pay a certain part to *the first mortgagee*, and retain the balance in satisfaction of his debt. In consideration of the sum named, being the amount of the first mortgagee's two claims, *the payment of which the second mortgagee assumed*, and of the second

[1] State Bank *v.* Campbell, 2 Rich. Eq. (S. C.) 179. See Dutton *v.* Ives, 5 Mich. 515.

[2] 5 Sim. 535.

(*f*) An act of parliament empowered a company to construct certain works, and to raise money by mortgaging them, — the mortgages and transfers to be void unless indorsed by the clerk. Mortgages were made, but not thus indorsed. Interest falling due, the company borrowed money on mortgage of commissioners, it being agreed between all parties, that the later mortgage should have priority. The commissioners, upon non-payment, entered and took the tolls, and, under an act, empowering them to sell property mortgaged to them for non-payment of interest, sold to a railway company, having notice of the informality of the first mortgage, which subsequently recognized the validity of such mortgage. In a suit by parties claiming under the original mortgagee, it was held that the sale was invalid, and the railway company was bound to account for the tolls. Jortin *v.* South Eastern, &c., 31 Eng. L. & Eq. 320.

mortgagee's own debt, the mortgagor conveyed the equity of redemption, subject to the claims of the first mortgagee, to the second mortgagee, and the latter covenanted to pay the former. Held, the second mortgagee's claim was hereby extinguished, and the first mortgagee need not pay it in order to maintain a bill for foreclosure upon both his incumbrances. (*g*)

9. If an agreement is entered into between a mortgagor and two successive mortgagees, that the first mortgagee shall take other security and release his mortgage, and the second mortgagee takes the land in satisfaction of his claim, according to an appraisal, which is actually made; the first mortgagee cannot maintain a bill to foreclose his mortgage, though the mortgagor has not wholly fulfilled his part of the agreement.[1] But unless the second mortgagee file a cross-bill for relief, he must be dismissed from the case, with costs, and a decree of foreclosure made against the mortgagor alone.[2]

10. In the case of Irwin *v.* Tabb,[3] it was held, that, where a mortgage is made to several persons, to secure several debts, but giving a partial priority to some over others; they are to be treated, in reference to their respective claims upon the property, as parties to one deed, with full notice, and not as prior and subsequent mortgagees. The facts of the case were, that a mortgage was made to three several creditors of the mortgagor, to secure preëxisting debts. The mortgagees

[1] Simonds *v.* Brown, 18 Verm. 231.
[2] Ibid.
[3] 17 S. & R. 419.

(*g*) F. sold land to C., and took a bond and mortgage from C. and M. to secure payment; C. afterwards sold to M. and took a mortgage back; F. obtained a judgment on the bond against C. and M., and levied on the personal property of M., but the execution was never returned; after the lapse of two years, F. assigned the balance of his judgment to T., who procured from M. a revival of the judgment, and agreed that he would have the execution returned, but never did. Held, that such agreement did not postpone T.'s claim under F.'s mortgage to C.'s mortgage. Cathcart's Appeal, 13 Penn. 416.

were absent and had no notice of the mortgage. The sum secured was $8,000, $2,000 to be paid to the one last named, and $3,000 each to the others. At this time, the second and third had advanced the amount of their respective claims, but the first had not. He afterwards, however, made up the full amount. The property was sold on execution under the mortgage, but the proceeds were less than the whole sum secured. Held, the mortgagee last named did not stand in the position of a subsequent incumbrancer, but as having an interest in common with the others, under the same title; that he had neither done any act nor relinquished any right by reason of the mortgage, to his own prejudice; that having affirmed the mortgage in part, he was bound by it in the whole; and therefore that the proceeds of sale should be distributed in the proportions mentioned in the deed. (*h*)

11. Where a first mortgage described the land as lot *eighteen* instead of *eight;* and a second mortgage described it correctly as to the number, but the second mortgagee had notice of the mistake in the prior mortgage; held, the prior mortgage should have precedence of the other.[1]

12. Where a bill to foreclose was brought against a defendant as second mortgagee, and he did not directly deny the priority of the plaintiff's mortgage, but merely stated that his was of the same date; held, it should be presumed to be subsequent to the plaintiff's, and was no defence.[2]

[1] Warburton *v.* Lanman, 2 Greene, 420. [2] Holabird *v.* Burr, 17 Conn. 556.

(*h*) On the 4th December, 1846, A. executed two mortgages on the same premises for the purchase-money; one to B., payable in nine equal annual instalments; and the other to C., for $8,623, payable in three annual instalments; the first to become due December 4, 1856. It was agreed that the mortgage to B. should be the first lien. This mortgage was subsequently assigned to C., and foreclosed under the statute. Upon the sale of the premises, January 5, 1850, they were struck off to D. for a sum larger than the amount due upon the mortgage, and costs of foreclosure. Held, C. was entitled to have the mortgage for $8,623 first satisfied out of the surplus money, and A. only to the balance. Barber *v.* Cary, 11 Barb. 549.

13. A second mortgagee, who has taken a conveyance with the title-deeds, without notice of the first mortgage, will not be compelled in equity to deliver up the deeds; but the first mortgagee will be left to his action of *trover* at law, where the right to the deeds accompanies the legal estate.[1]

14. The prior right of a first mortgagee may be established, in a proceeding instituted by a second mortgagee, to which the former is made a party defendant, although the object of it is to foreclose the second mortgage. Thus the assignee of a second mortgage filed a bill of foreclosure, making the assignee of the first mortgage a party, who in his answer prayed for a sale of the land and priority of payment. Held, in case of sale, he should be first paid.[2]

15. A sale on execution upon the debt secured by a first mortgage may operate to extinguish all subsequent mortgages. Thus, in case of a mortgage to secure bonds payable in ten years, with interest semi-annually, judgment was recovered on the bonds for interest, and a sale made within ten years to the mortgagee, upon a *venditioni*. Held, this divested the mortgage and all subsequent mortgages.[3]

16. In the following case, however, no such extinguishment of subsequent mortgages was held to result from an execution sale.

17. Three successive mortgages of the same land were made to three different parties. The two first mortgagees entered on the same day for breach of condition. Subsequently, a creditor of the mortgagor attached his right of redemption, recovered judgment against him, and afterwards purchased the first mortgage, and took an assignment of it. He subsequently bought the right in equity at the execution sale, and, a year having expired, supposing and representing himself to be absolute owner of the estate, made a warranty deed of it. The second mortgagee tendered to the grantee the sum due upon the first mortgage, protesting that he considered it as extinguished, and brings a bill in equity to

[1] Head *v.* Egerton, 3 P. Wms. 280; Hooper *v.* Ramsbottom, 6 Taunt. 12.

[2] Troth *v.* Hunt, 8 Blackf. 580.

[3] Clarke *v.* Stanley, 10 Barr, 472.

redeem. Held, the execution purchaser did not, by buying the equity of redemption, exclude intervening incumbrances, as by the English law would have been the result, the doctrine of *tacking* being unknown in Maine; that the execution sale did not abridge the right of the second mortgagee to redeem the first mortgage from three years to one year, this provision applying exclusively to the relation between the mortgagor and execution purchaser, and not affecting the claims of other mortgagees, prior to the attachment, which are not liable to be impaired by any dealing between the mortgagor and his creditors; and that the first mortgage was not extinguished, by being united with the equity of redemption in the hands of the execution purchaser. Decreed, that, on payment of the sum due on the first mortgage, the grantee of the execution purchaser should surrender the land, and convey and release his right as the assignee of such purchaser.[1]

18. A second mortgagee may take an assignment of the first mortgage, with all the benefits incident thereto.[2] But to an action by a second mortgagee for the land against a stranger, it is no defence, that, after commencement of suit, he has become assignee of the first mortgage.[3]

19. If a second mortgagee enter for foreclosure, and the first mortgagee afterwards enter for the like purpose, and if the second mortgage is foreclosed, such foreclosure will cut off the equity of redemption, and all subsequent mortgages, though such mortgages are held by the first mortgagee.[4]

20. Where the first mortgage is paid by the mortgagor, a second mortgagee may file a bill for an assignment of the legal estate, though the mortgagor have tendered him the amount of his debt, and a decree been obtained for redemption, until the time fixed for redemption has arrived; though (it is said) he will probably be thereby charged with costs, if he were properly notified, six months beforehand, of the proposed tender.[5]

[1] Thompson *v.* Chandler, 7 Greenl. 377.
[2] Bank, &c. *v.* Peter, 13 Pet. 123.
[3] Hall *v.* Bell, 6 Met. 431.
[4] Palmer *v.* Fowley, 5 Gray, 545.
[5] Coote, 476; Grugeon *v.* Gerrard, 4 Y. & Coll. 119.

21. On a bill to foreclose by a junior mortgagee, the prior mortgage not being due, the plaintiff will be allowed to sell, subject to the first mortgage.[1]

22. Where a second mortgagee pays the first mortgagee, if justice requires it, the law will presume an assent by the latter to the use of all securities in his hands, in order to compel payment. Thus, certain premises being subject to a mortgage, an attachment, and a second mortgage subsequent to both, the first mortgagee brings a bill for foreclosure, to which the mortgagor and subsequent mortgagee are parties, and obtains a decree. The attaching creditor then recovers judgment, and levies his execution upon the premises, subject to the first mortgage. Pending the time limited by the decree of foreclosure, and within six months after the levy, the second mortgagee redeems the first mortgage, by depositing with the clerk of the court the amount of the decree. Held, he was hereby subrogated to all the equitable rights of the first mortgagee, and could hold the land as against the execution creditor, till reimbursed the amount paid.[2]

23. Upon a principle of equitable adjustment, if the owner of two estates first mortgages both to the same person, and afterwards one of them to another person, a court of equity may order the first mortgagee to satisfy his claim from the estate not included in the second mortgage, if sufficient for that purpose, in order to make room for the second mortgagee.[3] So, upon a bill for foreclosure, subsequent mortgagees may require the plaintiff to apply towards the payment of his debt collateral security in his hands, to which they are not parties.[4] (*i*)

[1] Western, &c. *v.* Eagle, &c., 1 Paige, 284.

[2] Downer *v.* Fox, 5 Washb. (Verm.) 388; acc. King *v.* McVickar, 3 Sandf. Cha. 199.

[3] Lanoy *v.* Athol, 2 Atk. 446; Mechanics', &c. *v.* Edwards, 1 Barb. 271.

[4] Pettibone *v.* Stevens, 15 Conn. 19.

(*i*) The principle stated in the text applies to a judgment creditor and mortgagee, as well as two successive mortgagees. But if the mortgagee, by

24. But the important condition is attached to this general rule of equity, that its application "will not prejudice the rights or interests of the party entitled to the double fund, nor do injustice to the common debtor, nor operate inequitably on the interests of other persons."[1] It is said: "A court of equity will take care not to give the junior creditor this relief, if it will endanger thereby the prior creditor, or in the least impair his prior right to raise his debt out of both funds. The utmost that equity enjoins in such a case is, that the creditor who has a prior right to two funds, shall first exhaust that to which the junior creditor cannot resort; but where there exists any doubt of the sufficiency of that fund, or even where the prior creditor is not willing to run the hazard of getting payment out of that fund, I know of no principle of equity which can take from him any part of his security, until he is completely satisfied."[2] So a first mortgagee "is entitled to be paid, or proceed to foreclosure, without being obliged to investigate titles arising after his own." Hence, where he has brought a writ of entry to foreclose, equity will not order him to assign the mortgage on payment of the mortgage debt and costs.[3] So a husband and wife conveyed the equity of redemption of her land, to be applied in payment of certain claims against the husband, which were previously

[1] Per Storrs, J., Ayres *v.* Husted, 15 Conn. 516.

[2] Per Spencer, C. J., Everston *v.* Booth, 19 Johns. 493; Butler *v.* Elliott, 15 Conn. 187; Henshaw *v.* Wells, 9 Humph. 568; Stamford, &c. *v.* Benedict, 15 Conn. 437.

[3] Butler *v.* Taylor, 5 Gray, 455; Palmer *v.* Fowley, Ibid. 545.

---

negligence, allows the judgment creditor to levy on property included in the mortgage, equity will not relieve. Baine *v.* Williams, 10 S. & M. 113.

Where a mortgage debt is secured by other property, and the mortgagor conveys the land subject to the incumbrance, the amount of which is taken from the price, and the mortgagee receives a part of his debt from the other security; in equity, the whole is still chargeable upon the land, for the benefit of the mortgagee, to the extent of the balance of his debt, and of the mortgagor for the residue. Ferris *v.* Crawford, 2 Denio, 595. In such case, it seems, the mortgagee, having brought a suit for foreclosure, cannot discontinue it, until the amount due the mortgagor is paid. Ibid.

secured in part by attachment of the husband's personal property, upon which two other creditors had subsequent attachments; the residue of the equity of redemption to be applied in payment of a debt due from the husband to his daughter, and the balance, if any, to be paid to another creditor of the husband. The two subsequent attaching creditors claimed that the grantee should be required to resort to the equity of redemption for satisfaction, before proceeding against the attached property. Held, upon a bill of interpleader, the law would not require him to do so, as the property constituting the two funds did not wholly belong to the husband, but the land belonged to his wife, and was conveyed only as collateral security, and specifically for the benefit of other creditors, whose equity was equal to that of the subsequent attaching creditors.[1] (*j*)

25. In general, a second mortgagee of one estate cannot be compelled by a first mortgagee of that estate and another to redeem the first mortgage, without a transfer of both estates. But if between the two mortgages the mortgagor sells the estate not included in the second mortgage, and the purchaser afterwards takes an assignment of the first mortgage; the purchaser may have a decree in one suit against the mortgagor for the completion of the purchase, and against him and the second mortgagee for the redemption of the estate not purchased by the plaintiff, on payment of the whole of the first mortgage debt, or for foreclosure of that estate.[2]

26. The rule of equitable adjustment or apportionment is applicable, where mortgaged estates descend to *different heirs*.[3] So *an execution purchaser* of an equity of redemption, as well as a subsequent mortgagee, may in equity compel a prior mortgagee, having other security, to exhaust it, before resorting to the land.[4]

[1] Ayers *v.* Husted, 15 Conn. 505.
[2] Sober *v.* Kemp, 6 Hare, 155.
[3] Lanoy *v.* Duke, &c. 2 Atk. 444.
[4] Miami, &c. *v.* Bank, &c., Wright, 249.

(*j*) In South Carolina, the right to compel a resort to one particular fund, among several, is not applied in favor of subsequent incumbrancers or general creditors. Bank *v.* Mitchell, Rice, (Eq.) 389.

27. Where there is a first mortgage on two estates, a second on one of them, and a third on the other or both, the right of marshalling will not be exercised in favor of the second, against the third mortgagee, though with notice of the second incumbrance. In such case, the first mortgage will be ratably apportioned between the two estates.[1]

28. In case of a mortgage to the defendants, to secure debts due to them from the mortgagor, and also from a corporation, the corporation at the same time mortgaging to secure the defendants' liabilities on its account; the whole property was insufficient to extinguish the liabilities of either description. Held, subsequent mortgagees could not claim the application of a proportional part of the value of the former mortgage, towards the company debt, but the defendants might apply the whole of it to the private debts of the mortgagor.[2]

29. In connection with the rights and obligations of parties arising from successive mortgages, may be considered those which result from other relations, collateral to the original transaction between mortgagor and mortgagee. It will be seen, that the discretionary and flexible powers of a court of equity are strikingly exhibited, in adjusting the various claims which grow out of a conveyance in itself very simple, — the transfer of land as security for a debt.

30. One of the cases in which the rules of equity are thus applied, is where a debt secured by mortgage has also been secured by the personal obligation of *a surety*. In such case, it is held to be "a general and well-established principle of equity, that a surety, or a party who stands in the situation of a surety, is entitled to be *subrogated* to all the rights and remedies of the creditor whose debt he is compelled to pay, as to any fund, lien, or equity, which the creditor had against any other person or property on account of such debt;"[3] so

[1] Barnes *v.* Racster, 1 Y. & Coll. 401.

[2] Kellogg *v.* Rockwell, 19 Conn. 446.

[3] Per Johnson, J., Mathews *v.* Aikin, 1 Comst. 599; Root *v.* Bancroft, 10 Met. 46; Copis *v.* Middleton, 1 Tur. & R. 231; Hodgson *v.* Shaw, 3 My. & K. 195; Williams *v.* Owen, 13 Sim. 597. See Sprigg *v.* Lyles, 2 Gill & J. 446; Ryan *v.* Shawneetown, 14 Illin. 20; Callum *v.* Branch, &c. 23 Ala. 797;

far as is necessary for his indemnity.[1] And it is sometimes held, that a surety for a debt secured by mortgage may, even before he has been injured, compel payment from the land in the first instance.[2]

31. In Hays *v.* Ward,[3] Chancellor Kent says: — "This doctrine does not belong merely to the civil law system. It is equally a well-settled principle in the English law, that a surety will be entitled to every remedy which the principal debtor has, to enforce every security, and to stand in the place of the creditor, and have those securities transferred to him, and to avail himself of those securities against the debtor. This right stands not upon contract, but upon the same principle of natural justice upon which one surety is entitled to contribution against another."[4] So it is said in a recent English case, that "the surety's right is not merely *a potential equity;* which, though it may be asserted by the party himself, yet cannot bind third persons. The equity gives to the surety a right to call for a transfer of the securities, and so binds those securities, into whatever hands they may come with notice of the charge."[5] And it is now held, that the right of subrogation, though originating in courts of equity, is fully recognized as a legal right; and any act of the creditor which interferes with that right, and is a fraud upon it, in law, as well as at equity, operates to discharge the surety.[6]

32. Conformably to these views, where a creditor recovered judgment against his debtor, sold his goods on execution, and took a mortgage to secure the payment, and a surety subsequently paid the debt; the surety was held entitled to the benefit of the mortgage.[7] So a surety may claim the benefit of the mortgage, as against a purchaser of the land from the mortgagor, although he satisfied the debt after

Garwood *v.* Eldridge, 1 Green, Ch. 145; Barnes *v.* Morris, 4 Ired. Eq. 22; Skillman *v.* Teeple, Saxt. 232; Babcock *v.* Morse, 19 Barb. 140.

[1] Bailey *v.* Warners, 2 Wms. 87.

[2] M'Lean *v.* Lafayette, &c., 3 McL. 587; State, &c. *v.* Campbell, 2 Rich. Eq. 179.

[3] 4 John. Ch. 130; acc. Bowker *v.* Bull, 1 Sim. (New) 34.

[4] See Hodgson *v.* Shaw, 3 My. & K. 183; Norton *v.* Coons, 3 Denio, 130.

[5] Bowker *v.* Bull, 1 Sim. (New) 34; see Higgins *v.* Frankis, 10 Jur. 328.

[6] La Farge *v.* Herter, 11 Barb. 159.

[7] Ottman *v.* Moak, 3 Sandf. Ch. 431.

having notice of the conveyance. Thus, a mortgage being made to secure the indorser of a note, the mortgagor afterwards conveyed the land; the indorser confessed a judgment on the note, at the same time taking other security from the maker, which proved worthless; the indorser satisfied the judgment after he had notice of the conveyance from the mortgagor; and the judgment creditor assigned the mortgage to the indorser, to secure his indemnity. Held, the mortgage was still in force for the indorser's benefit, he being subrogated to the rights of the mortgagee.[1] So a mortgagor conveyed his estate, the purchaser assuming the mortgage debt. The latter then conveyed the estate, the purchaser from him also assuming the mortgage debt. The mortgagor having obtained a decree in equity against both purchasers for payment of the debt and for his own indemnity; the first purchaser was compelled by execution to pay the debt. Held, he thereby became *subrogated* to the mortgagee, and without an actual assignment might foreclose the mortgage.[2]

33. Where a deed is executed for the security of notes indorsed by different individuals, a court of chancery, at the instance of any of the indorsers, will compel a *pro ratâ* distribution of the proceeds of the trust sale.[3]

34. A surety for a debt, secured by mortgage, has in equity substantially the same rights in reference to the property, which he would have if he were actually a party to the mortgage. Thus, in 1827, R. & J. Bancroft mortgaged to Root & Stow to secure a note to Root, and two others signed by them, and Stow as surety. In 1832, the first note being unpaid, a writ of entry was sued out against the mortgagors, and a conditional judgment recovered and execution taken out, but never delivered to an officer, nor was possession ever taken. Stow, having paid the notes for which he was liable, brought an action against the Bancrofts for the amount paid by him,

[1] Gossin *v.* Brown, 11 Penn. 527.
[2] M'Lean *v.* Towle, 3 Sandf. Ch. 123.
[3] McDermott *v.* Bank, &c. 9 Humph. 579.

recovered judgment, caused the equity of redemption to be sold on execution, and became himself the purchaser. The first note remaining unpaid, the plaintiffs, administrators of Root, demanded possession of the land, and bring this suit, being a bill in equity against the mortgagors and Stow, alleging that the latter held his moiety of the legal estate in trust to secure payment of the first notes, and was bound to account with the plaintiffs for the rents and profits. Held, the lands should be held by the plaintiffs, according to their respective equitable rights; that the Court had jurisdiction in equity, both because the original mortgagees were trustees for each other and tenants in common, and because, in regard to mortgaged lands, the administrator represents the intestate. "On the face of the mortgage deed, Stow took a moiety of the real estate, but having no beneficial interest in the condition, he was *primâ facie* trustee of such moiety, in the first instance, for Root. Then, if Stow, by this deed, acquired any right, legal or equitable, to the mortgaged property, as security for the repayment to him of any sums which he, as surety on the two notes, might be held to pay — as we think he did — his condition in relation to Root could not be better than that of a second mortgagee. His claim must be subordinate to that of Root, and after Root had been paid in full. The condition was, to secure to Root the payment of all the notes. It was only after the mortgagors had failed to pay Root, and after Stow, as surety, had been obliged to pay Root, that Stow had any claim for security, or any equitable or beneficial interest. If the name of Stow had not been introduced into the first deed, but the Bancrofts had made a second mortgage to Stow, conditioned to indemnify him against his suretyship to Root, the relation of Root and Stow would have been nearly similar; the claims of the latter being subordinate to those of the former." "Being tenants in common, no entry of the one, under a purchase of the equity of redemption, or under color of a judgment or otherwise, would be deemed an ouster of the other; but, as between themselves, the entry enures to the benefit of both."

Decreed, accordingly, that an account be taken of the sum due on the first note; upon payment of which, the defendant, Stow, should hold the land; but unless paid within some short time, to be fixed by the Court, the plaintiffs to have possession.[1]

35. If, by the creditor's neglect, the benefit of some of the securities is lost, the surety is *pro tanto* discharged.[2] (*k*) Thus A., as principal, and B., as surety, executed a note to C. After the note fell due, A. executed a deed in trust to C., with authority to the trustee to sell, for the satisfaction of this debt, after six months. The deed was made without the assent of B. Held, an agreement that the collection of the note should be delayed was necessarily implied, being further established by the attending circumstances; and the surety was discharged.[3]

36. But on the other hand, it has been held that, if a creditor accepts from the principal debtor a mortgage to secure his debt, which mortgage is payable at a day subsequent to the maturity of the debt; he does not thereby give time to the principal upon the debt, and a surety for the debt will not be discharged. A giving time, to discharge a surety, must operate upon the debt itself.[4]

37. And upon the general subject the following distinctions have been laid down. Where one executes a bond with surety, and at the same time a mortgage to secure the same

[1] Root *v.* Stow, 13 Met. 5, 9, 10.
[2] Capel *v.* Butler, 2 Sim. & S. 457.
[3] Lea *v.* Dozier, 10 Humph. 447.
[4] U. States *v.* Hodge, 6 How. U. S. 279.

(*k*) On the other hand, a surety may lose his claim on the principal, by his own laches in relation to a mortgage. A.'s land was sold on execution against him as B.'s surety, and, within the year allowed for redemption, A. mortgaged the land to C., without referring to the sale. C. filed a bill for foreclosure, to which A. and B. were parties. Neither party answered, and the land was sold under a decree. Held, A.'s payment was withdrawn and lost to B. by A.'s own default, and therefore A.'s claim on B. was extinguished. Jarvis *v.* Whitman, 12 B. Mon. 97.

debt, which the surety pays, the latter shall stand in the place of the creditor in respect to the mortgage. So if there be only one specialty, namely, the mortgage; because there the payment does not, as in case of a bond, extinguish the security without a reconveyance; there is something to assign or transfer. But if a further charge is afterwards made by the mortgagor, in favor of the same mortgagee, the surety cannot, on paying off the first charge, call for an assignment of the mortgage, without redeeming the latter, unless a right of redemption is given him.[1] So the doctrine of subrogation does not apply, where the surety guarantees one part of the debt, and the security is given for another part; nor, it seems, when the security is subsequently given, by an independent transaction. Nor can the surety require an assignment of the original debt, nor of an instrument which becomes void by payment of the debt, as in case of a joint and several bond by principal and surety. Otherwise, where the surety has executed a separate obligation, which is paid by him or from his estate.[2]

38. Nor does the doctrine of subrogation apply, where a party, though in fact a mere surety, does not appear as such either upon the note or the mortgage. (*l*) Thus

[1] Copis *v.* Middleton, 1 Turn. & R. 231; Hodgson *v.* Shaw, 3 My. & K. 195; Williams *v.* Owen, 13 Sim. 597.

[2] Wade *v.* Coope, 2 Sim. 155; 1 Turn. & R. 231.

(*l*) After the recovery of a judgment against principal and surety, and a levy upon the property of the principal, the creditor took a bond and mortgage from the principal, for the amount of the judgment, and in absolute payment thereof, and acknowledged satisfaction of the execution, by an indorsement thereon, and afterwards brought an action upon the judgment. Held, the suretyship might be proved by evidence *aliunde;* and was a defence to the action. La Farge *v.* Herter, 11 Barb. 159. Also, that the plaintiff could not prove that the bond and mortgage were usurious. Had the plaintiff attempted to foreclose, and the mortgagor set up the usury, the plaintiff might rely upon the invalidity of the bond and mortgage; but his remedy on the judgment, even then, would only be revived against the mortgagor, and not against his co-defendant. Ibid.

the defendants executed a mortgage to the plaintiff, to secure a joint and several note, one of them, however, being in fact only a surety for the other. The principal debtor afterwards mortgaged a part of the land, and the mortgage was assigned to the plaintiff, who foreclosed the second mortgage. He then brings this bill to foreclose the first. Held, the surety defendant was not entitled, as he claimed, to stand in the place of the first mortgagee, and hold the whole property for his indemnity, because neither the record of the first mortgage nor the note indicated that he was a surety, and the plaintiff stood as a *bonâ fide* purchaser of that mortgage without notice.[1] So, where one mortgages land, and afterwards gives the mortgagee collateral security for the debt, a purchaser of the land from the mortgagor, subject to the mortgage, cannot claim the benefit of such security, but the land becomes the primary fund for payment of the debt.[2] (*m*)

39. A mortgagor may himself, under some circumstances, have the rights of a surety in regard to the mortgage debt. Thus where A. executed a mortgage to B., to secure a debt, and also transferred to B., without indorsement, two notes of a third person, which notes A. guaranteed; and B., at the same time, by a defeasance, stipulated that "B. should not

[1] Orvis *v.* Newell, 17 Conn. 97.

[2] Brewer *v.* Staples, 3 Sandf. Ch. 579.

(*m*) Indorsed notes were given by the assignee of an equity of redemption to the assignee of the mortgage, for interest due on the mortgage, and were paid at maturity by the indorser. No assignment of the mortgage was made. On the sale of the premises, the indorser claimed to be subrogated to the rights of the mortgagee, to the extent of the notes paid by him, and thus to take precedence of a subsequent mortgagee in the distribution of the proceeds. Held, that the indorser, having been no party to the original transaction, and never having been the surety of the original debtor, and moreover having paid only a portion of the debt, could not maintain his claim of substitution, but must take rank as a simple contract creditor only. Swan *v.* Patterson, 7 Md. 164.

call on A., or hold him liable, until the insolvency or inability to pay of the obligors was ascertained by legal process;" held, the deeds must be construed together, and the mortgage was not to be enforced, until the insolvency, and inability to pay, of the maker of the notes. But, also, that collection "by legal process" referred only to a judgment and execution at law, and that the party was not bound to resort to equity, to remove any impediments to a satisfaction of a judgment and execution at law, such as a fraudulent conveyance, or the like.[1]

40. A subsequent mortgagee, as well as a surety, may in equity claim the benefit of other security taken by the first mortgagee. And where a mortgagee takes subsidiary security, to the benefit of which a subsequent mortgagee is entitled, and there is likely to be a long controversy, a decree will be made for the immediate satisfaction of the first mortgage, instead of requiring the mortgagee to resort to the additional security; and the decree will at the same time provide for the second mortgagee's right of subrogation.[2]

41. A mortgage may be made for indemnity *to a surety*, as well as to a creditor who holds the additional security of a surety for the mortgage debt.

42. In reference to the rights of the surety himself, holding such mortgage of indemnity; he cannot foreclose till he has paid the debt, and the bill must allege such payment.[3] But if there is a power of sale, whenever a judgment on the debt is rendered against the surety, and before maturity of the debt he purchases or pays it, equity will enforce the deed for his benefit, to the extent of his disbursement.[4] (See p. 451, n.)

43. Where a mortgage is given to indemnify the surety upon a note, proof of execution and registry is *primâ facie* evidence of title without producing the note, which is not presumed to be in the mortgagee's possession. The burden of proof is on the defendant.[5]

[1] Burton *v.* Wheeler, 7 Ired. Eq. 217.

[2] King *v.* McVickar, 3 Sandf. Ch. 192.

[3] Shepard *v.* Shepard, 6 Conn. 37; Lewis *v.* Richey, 5 Ind. 152.

[4] Graham *v.* King, 15 Ala. 573.

[5] Davis *v.* Mills, 18 Pick. 394.

44. A deed, conditioned to become void, unless a certain sum is paid by the grantee by a certain day, is a mortgage. If the mortgagee give security for the debt, he has the burden of proving payment. If payable in money, he must prove payment on the day, otherwise the condition is broken, and the estate revests, by operation of law, without formal entry.[1]

45. A mortgage of indemnity, reciting an accompanying bond, which in fact was never delivered, is held valid. But not a mortgage, reciting that the mortgagee is liable for the mortgagor, when in fact the former has made a mere verbal promise, not binding in law; as against creditors of the mortgagor.[2]

46. Where a mortgage is made to a surety, for the purpose of indemnifying him against his liability on account of the mortgagor, substantially the same equitable rules, *mutatis mutandis*, are applied, as in the case above referred to, of a mortgage accompanied by other security.[3] (*n*) It is held, that such a mortgage is, in reality, a security for the debt itself, to the benefit of which the creditor is entitled;[4] more especially where both debtors become insolvent.[5] So where

[1] Austin *v.* Downer, 25 Verm. 558.
[2] Lake *v.* Brutton, 23 Eng. L. & Eq. 628.
[3] See Holabird *v.* Burr, 17 Conn. 556; Reinbard *v.* Bank, &c. 6 B. Mon. 252; Miller *v.* Musselman, 6 Whart. 354; Post *v.* Tradesmen's, &c. 28 Conn. 420.
[4] Lewis *v.* De Forest, 20 Conn. 427; Stockard *v.* Stockard, 7 Humph. 303.
[5] Moore *v.* Moberly, 7 B. Mon. 299; Storer *v.* Herrington, 7 Ala. 142; Dick *v.* Truly, 1 S. & M. Ch. 557.

(*n*) With reference to the surety himself, as has been seen, (s. 42,) it is held that a mortgage held as an indemnity cannot be foreclosed, until the mortgagee has had something to pay, or has been otherwise injured. Francis *v.* Porter, 7 Ind. 213. Thus, where an administrator executed a mortgage to his sureties, conditioned, that, if he should faithfully administer, &c., and save the mortgagees harmless, as such sureties, the mortgage should be void; held, the mortgagees could not foreclose, until a failure on the part of the administrator to administer faithfully. Ellis *v.* Martin, 7 Ind. 652. But where the mortgage contains an express *covenant*, it is held, that the surety may maintain a suit for foreclosure before actual payment of the debt. De Cottes *v.* Jeffers, 7 Flori. 284.

a mortgagee assigns the mortgage and guarantees the debt, taking other security for his own indemnity, the general rule is applicable in favor of the assignee, even though the assignee did not originally rely upon such security or know of its existence.[1] (*o*)

47. Where a mortgage is made to secure an indorser, the creditor cannot claim the benefit of it till the indorser's liability is fixed; and, if the latter is discharged by his laches, he loses all title to the property.[2] (*p*) And it is held, that an accommodation indorser may discharge a mortgage made for his indemnity, at any time before his liability becomes absolute.[3] So a surety receiving a mortgage as security may surrender it at any time before the insolvency of the principal debtor. The security does not in the first instance attach to the debt, as an incident, nor constitute the mortgagee a trustee, but the creditor's equity in relation to it arises subsequently, upon such insolvency. And if the security has been thus surrendered, and the property mortgaged to another party; a court of equity will not compel the application of it to the original creditor, to whom the former mortgagee became surety for the mortgagor.[4]

48. Where a surety obtains a mortgage from the princi-

[1] Curtis *v.* Tyler, 9 Paige, 432.
[2] Tilford *v.* James, 7 B. Mon. 336.
[3] Ibid.
[4] Jones *v.* Quinnipiack, &c. 29 Conn. 25.

(*o*) It has been held, that a mortgage given by a guardian to his sureties, conditioned "to pay over to the ward all the moneys in the hands of the guardian, as such when he (the ward) should arrive of full age," does not create a trust in favor of the ward; but the mortgagees have the legal and beneficial interest in it, and may use it as their own. Miller *v.* Wack, Saxton, 204.

(*p*) The maker of a note gave to the indorser a judgment bond for security. The note was protested, but no notice given to the indorser, who, however, in consideration of a release from his liability, assigned the judgment to the holder of the note. Held, the waiver of want of notice defeated the claim of a subsequent mortgagee. Phillips *v.* Thompson, 2 Johns. Ch. 418. See Hilton *v.* Catherwood, 10 Ohio, St. 109.

pal debtor, to secure him against his liability, and also to secure a debt due to himself, the creditor is entitled to the benefit of the mortgage, and to be paid out of the first proceeds, in preference to the surety himself, or his assignees under an assignment for the benefit of his creditors.[1]

49. A mortgage was made to indemnify the mortgagee for his liability as surety upon several notes. Some of the notes being barred by the statute of limitations, the mortgagor became an insolvent debtor under the insolvent laws of Massachusetts. Held, the mortgagee might apply the property first to the notes still in force, and the rest should be distributed *pro ratâ* among the holders of the others, who had an equitable lien on the fund; but that he could not pay some of the outlawed notes from the property to the exclusion of others, the latter having an equal equitable claim with the former. Also, that the property was subject to this equitable lien, although the mortgage had been foreclosed, and as against attaching creditors or grantees of the mortgagee, or an assignment under the insolvent laws.[2]

50. A mortgage having been made to indemnify a surety for the mortgagor upon various debts; by an arrangement between one of the creditors, the mortgagor and mortgagee, the mortgagor paid a part of the debts, and the creditor the rest, the latter taking an assignment of the mortgage, to hold as security for his own debt. Held, as against a judgment creditor of the mortgagor, prior to the assignment, the assignee could enforce the mortgage only for the amount paid to procure it.[3]

51. Mortgage to indemnify an indorser; with a provision, that, if the mortgagor fail in payment of the note, whoever might be the holder, the mortgagee, upon affidavit of nonpayment and the amount due, might foreclose, &c. The mortgage was afterwards transferred, without recourse, to the indorsee of the note. Held, the mortgage was valid in the

[1] Ten Eyck *v.* Holmes, 3 Sandf. Ch. 428.

[2] Eastman *v.* Foster, 8 Met. 19.

[3] Yelverton *v.* Shelden, 2 Sandf. Ch. 481.

indorsee's hands, and might be foreclosed by him, and the property subjected to payment of the note.[1] Such mortgage creates a trust for the benefit of the indorsee; and, if the mortgage is not assigned, the mortgagee may be compelled to allow the use of his name in a suit to enforce payment of the note.[2]

52. Where judgment is recovered against both principal and surety, the former having given a mortgage of indemnity to the latter, the surety cannot claim priority of older judgments against the principal alone, in reference to a lien upon the land, by reason of his mortgage. He can claim only upon the mortgage directly.[3]

53. If the surety, believing that his mortgage gives him such priority over older judgments, causes the execution against himself and the principal to be levied on the mortgaged land, and become himself the purchaser; he may afterwards foreclose in equity, especially after stipulating that the land shall sell for as much as the execution price.[4]

54. Where a mortgage is made to indemnify the mortgagee for his liability upon subsequent indorsements on account of the mortgagor; judgments having been recovered against the indorser upon his indorsements, if others, having a lien upon the land, bring a bill in equity, for the purpose of having it sold, and all parties in interest are before the Court; the mortgagee may require that the proceeds be applied to such judgments, though he has not paid them.[5]

55. Where a conveyance is made to a trustee, to indemnify the surety of the grantor, who, after paying the debt, takes a conveyance from the trustee in satisfaction of the debt, under an order from the heirs of the grantor, made for "the safety of the trustee," and under an impression that they "have no interest in the premises;" the equitable rights of the heirs are not thereby prejudiced.[6] If the trustee, in such case, convey to the surety, in satisfaction of the debt of the grantor, the surety, as to minor heirs of the grantor,

[1] Stewart *v.* Preston, 1 Branch, 10.
[2] Ibid.
[3] Stover *v.* Herrington, 7 Ala. 142.
[4] Ibid.
[5] Kramer *v.* Bank, &c. 15 Ohio, 253.
[6] Irwin *v.* Longworth, 20 Ohio, 581.

takes the premises charged with the trust; and the original trustee will be responsible for a breach of the trust by his grantee.[1]

56. In such case, an order to the original trustee to convey to the surety, executed by the heirs, for the safety of the original trustee, is not a surrender of the equity of the heirs in the premises so conveyed, unless the order contain words which expressly, or by inference, surrender the equity.[2]

57. Where one of several sureties receives a mortgage as indemnity, and pays the debt, unless he use reasonable diligence to appropriate the mortgage to a repayment, he cannot compel contribution.[3]

58. Where a mortgage is made to a surety, to indemnify him as surety on several debts, on some of which there are co-sureties, and the mortgage proves insufficient to satisfy all the debts, it should be applied to them *pro ratâ*.[4]

59. Where one of several sureties is secured by mortgage, he is not bound to enforce his mortgage, before he pays the debt, or has reason to apprehend that he must pay it, unless the mortgagor is wasting the estate; in which case, if he fails to do so, he is chargeable to his co-sureties, with the fair value of the property at a coercive sale.[5]

60. Where one of two sureties receives property by deed of trust, to indemnify him, and the trustee sells the property by direction of the surety, but fails to collect the money, he is not entitled to contribution.[6]

61. A. mortgaged to B., to secure him as a surety for a debt which B. afterwards paid. B. received from the estate of C., a co-surety, a contribution towards the sum thus paid. Held, B. might still claim upon the mortgage the full amount paid by him, leaving the account between B. and the estate of C. to be adjusted between themselves.[7]

62. A. made a mortgage to B., conditioned to pay a debt due him, and also certain other debts, on which B. was

[1] Irwin *v.* Longworth, 20 Ohio, 581.
[2] Ibid.
[3] Goodloe *v.* Clay, 6 B. Mon. 236.
[4] Ibid.
[5] Teeter *v.* Pierce, 11 B. Mon. 399.
[6] Chilton *v.* Chapman, 13 Mis. 470.
[7] Strong *v.* Blanchard, 4 Allen, 555.

liable as surety of A., in some cases alone, and in others jointly with other persons. A. also assigned to B. certain personal securities for the same object. Held, that B. took the mortgage and securities for the benefit of all such creditors and his joint sureties; that the fund arising from them should be applied *pro ratâ* to all the debts, and, on a proceeding for contribution by B. against his co-sureties, that they were liable only for their shares of the deficit after such *pro ratâ* application of the fund to all the debts, including the debt due to B.[1]

63. Where property was mortgaged to two sureties of the mortgagor to secure them, and, after his default and their payment of his debt, was sold and purchased for the joint benefit of the mortgagees, and one of them sold all his interest in the purchase to a junior mortgagee, with the agreement, that, if he was entitled to the whole, it passed by the sale, and if he was entitled to only half, that part passed: the co-mortgagee having died; held, on a bill to which all interested were parties, that one half of the mortgaged premises, purchased for the joint benefit of the mortgagees, should be decreed to the heirs of the deceased mortgagee; and, as the original bill by the joint mortgagees for foreclosure was not yet finally determined, this decree was entered on that bill.[2]

64. Where there are more sureties than one, to whom a mortgage is given for indemnity, one cannot buy the land from a prior mortgagee, who has bought it under a decree enforcing his mortgage, to the prejudice of the other sureties; but they shall share in the benefit of such purchase.[3]

65. A. became security for B., for a separate debt due from B., and for B. and C., for other debts jointly due from both. B. executed a note and mortgage to A., to secure him for the whole of the separate debt, and for B.'s ratable proportion of the joint debts. It was, at the same time, agreed, that, when B. had paid the whole of the first debt, and a moiety of each

[1] Moore *v.* Moberly, 7 B. Mon. 299.
[2] Stemmons *v.* Duncan, 9 B. Mon. 351.
[3] Hilton *v.* Crist, 5 Dana, 384.

of the others, the note and mortgage should be cancelled. B. having paid the amount thus stipulated to be paid by him on all the debts, held, A. could not avail himself of the note and mortgage as security against the remainder, and a bill by him to foreclose was dismissed with costs.[1]

66. A mortgage was taken from A. to indemnify B., who had given his bond for a loan to A., in which bond C. was bound for B. The mortgage was afterwards assigned absolutely by B. to C., the same to be at C.'s risk, and the debt to be collected at his expense. Held, that C. might recover on the mortgage, not only the debt and interest for which he was bound, but the reasonable expenses of collection; and that the Court should have decided the amount recoverable under the assignment, as matter of law arising on the assignment.[2]

67. A., being the principal debtor on a note, assigned to his sureties thereon a bond and mortgage, with the condition that they should pay the note, and afterwards assigned other property to trustees, to sell the same, and apply the proceeds to the payment of the note, and the residue, if any, to other certain creditors named. Upon a creditor's bill, afterwards filed against A., held, the complainants could not insist that the note should be paid out of the fund in the hands of the trustees, so as to give them the benefit of the bond and mortgage; but the bond and mortgage were the primary fund for the payment of the note, which the holders were bound first to exhaust, before resorting to the fund in the hands of the trustees, so as to give the other creditors, mentioned in the assignment to trustees, the benefit of that fund, the complainant's equity being subsequent to theirs.[3]

68. Somewhat analogous to the case of successive mortgages, in so far as it involves the change of a single liability and charge into several distinct burdens upon the same property, is that of a conveyance by the mortgagor of a portion of the land mortgaged, retaining the remainder; or the conveyance of different portions, included in one mortgage,

[1] Newell *v.* Hurlburt, 2 Verm. 35.
[2] Knox *v.* Moatz, 15 Penn. 74.
[3] Besley *v.* Lawrence, 11 Paige, 581.

to successive purchasers; and the apportionment of the mortgage debt upon such parcels, respectively.

69. By way of general introduction to the rules of law upon this subject, it may be stated as "a well settled legal doctrine, that where lands are charged with a burden, that burden should be shared equally. Courts of equity will always enforce this rule, either upon the principle of contribution, or in some other mode that will do substantial justice between the parties. It is an equally well settled rule, that if one party has deprived the other of his right to enforce a contribution, or, what is here deemed equivalent, the right of substitution in place of the mortgage, he will be excluded from so much of his demand as the party might have enforced but for the interference of him who has thus discharged a portion of the lien."[1] And, in a very late case, the same general rule has been stated as follows:—"Where a creditor has a lien upon two funds belonging to one debtor, and another creditor has a subsequent lien upon only one of them, the former is under obligation to exhaust first the fund upon which he has an exclusive lien, before he can resort to the other."[2] (*q*) "It is nothing more than the obvious duty so to use one's own as not to injure another. If the paramount creditor resorts to the doubly charged fund or property, the junior creditor will be substituted to his rights, and will be satisfied out of the other fund to the extent to which his own may have been exhausted. This is an equity against the debtor himself, that the accidental resort of the paramount creditor to the fund doubly encumbered, shall not enable him to get back

[1] Per Dewey, J. Parkman *v.* Welch, 19 Pick. 238. See Kilborn *v.* Robbins, 4 Allen, 369.

[2] Per Strong, J. Delaware, &c., 38 Penn. 516.

(*q*) M. mortgaged three lots to A., then mortgaged No. 1 to B., then sold No. 2 to C. Held, that B could compel A. to exhaust No. 3 before touching No. 1, but that Nos. 1 and 2 ought to contribute equally towards A.'s claim, as the equities of B. and C., an innocent purchaser, were equal, though if No. 2 had remained in M.'s hands, it would have been liable in equity before No. 1. Reilly *v.* Mayer, 1 Beasl. 55.

the other fund discharged of both debts. And being an equity against the debtor, it is of course equally such against his subsequent judgment creditors, who have no greater rights than their debtor had at the time their judgments were entered." [1]

70. Conformably to this principle, the owner of a part of mortgaged land — even a purchaser by parol to prevent a sale — may pay the mortgage, and claim an account and an assignment of the mortgage, or to be subrogated to the mortgage and a judgment thereon.[2] So different purchasers, having equal equities, must contribute to the mortgage in proportion to the relative value of their shares.[3] (*r*) And neither can compel more than this by obtaining an assignment of the mortgage.[4] Thus, where the interest of a part-owner of land subject to a joint mortgage, executed before partition, is sold on execution, the purchaser may be compelled to pay the whole mortgage debt in order to save his property, and may then recover one half from the other mortgagor.[5]

71. Having stated these general principles of *equality* in bearing the burden of a mortgage, as between parties interested in distinct portions of the property, we now recur to the important subject suggested above, (s. 68,) namely, the respective rights and liabilities of the owners of different estates subject to one mortgage. Upon this point the general rule is, that, if the mortgagor conveys a part of the land, retaining the rest, more especially if such conveyance

[1] Per Strong, J. Delaware, &c., 38 Penn. 516.
[2] Salem *v.* Edgerly, 33 N. H. 46; Champlin *v.* Williams, 9 Barr. 341.
[3] Salem *v.* Edgerly, 33 N. H. 46; Beall *v.* Barclay, 10 B. Mon. 261; Aiken *v.* Gale, 37 N. H. 501.
[4] Ibid.
[5] Stroud *v.* Casey, 27 Penn. 471.

(*r*) It is held that, where two at different times purchase parcels of the mortgaged premises, they should bear the incumbrance in proportion to the value of their respective parcels, unaffected by improvements made by either party thereon. Bates *v.* Ruddick, 2 Clarke, (Iowa) 423.

contains covenants of warranty; (*s*) the part retained is primarily liable for the mortgage debt. The purchaser becomes a *quasi* surety for such debt. If the mortgagor retains a part, and conveys the rest to different purchasers, the part retained is primarily liable, and the portions conveyed are liable in the inverse order of their alienation. And the latter branch of the rule applies, where the whole land is successively conveyed.[1] (*t*)

72. The doctrine above stated is of ancient origin. In Herbert's case (3 Co. 11), it is laid down, that, if one is seised of three acres under an incumbrance, and enfeoffs A. of one acre and B. of another, and the third acre descends to the heir, who discharges the incumbrance; he shall not have contribution, "for he sits in the seat of his ancestor."

[1] Ferguson *v.* Kimball, 3 Barb. Ch. 616; Cushing *v.* Ayer, 25 Maine, 383; Kellogg *v.* Rand, 11 Paige, 59; Cumming *v.* Cumming, 3 Kelly, 460; Knickerbacker *v.* Boutwell, 2 Sandf. Ch. 319; Henkle *v.* Allstadt, 4 Gratt. 284; Skeel *v.* Spraker, 8 Paige, 182; Allen *v.* Clark, 17 Pick. 47; Clowes *v.* Dickenson, 5 Johns. Ch. 240; Seahor *v.* Robbins, 1 Root, 460; Sheperd *v.* Adams, 32 Maine, 63; Shannon *v.* Marsellis, Saxt. 413; Britton *v.* Updike, 2 Green, Ch. 125; Wikoff *v.* Davis, 2 Green, Ch. 224; Porter *v.* Seahor, 2 Root, 146; Mayo *v.* Tompkins, 6 Munf. 520; Black *v.* Morse, 3 Halst. Ch. 509; Howard, &c. *v.* Halsey, 4 Sandf. 565; 22 Barb. 54; Lyman *v.* Lyman, 32 Verm. 79; Byers *v.* Fowler, 14 Ark. 86.

(*s*) To a suit upon such warranty it is no defence, that the mortgagee had obtained a decree of foreclosure upon the part conveyed. Cheever *v.* Fair, 5 Cal. 337.

(*t*) Where one person has two mortgages from different persons on different estates, and another person has a mortgage on only one of them, equity will not compel the former to resort first to the fund on which the latter has no claim. Woollen *v.* Hillen, 9 Gill, 185. See Herriman *v.* Skillman, 33 Barb. 378.

Mortgages, successively to A., B. and C., on the same land, except seventy-five acres not included in B's deed. Held, as against A. and C., B. had a right to have A.'s mortgage satisfied from that part of the land, and that C. could not call on B. to contribute *pro ratâ* to payment of A.'s mortgage. Conrad *v.* Harrison, 3 Leigh, 532. Where there are judgments prior to a mortgage, which are paid from a sale of part of the land, the mortgagee may claim an assignment of such judgments. So, although he took a judgment note which he failed to enter up, and paid money to the mortgagor on other accounts. Delaware, &c., 38 Penn. 512.

73. The rule in question, however, finds its chief application as between parties claiming subject to the mortgage. In reference to the mortgagee himself, it is said to be so administered as to throw a general lien upon such particular parcel, as will give a mortgagee the benefit of his priority, either upon the whole or a part of the land;[1] and the mortgagor is held still to remain the principal debtor.[2] The mortgagee may elect between the portion remaining in the mortgagor and that conveyed by him,[3] (*u*) more especially if he had no notice of the conveyance.[4] Thus, where one mortgage was made upon two lots, a second to another person upon one, and a third to another person upon the other; held, the first mortgagee could not be compelled by the second to resort first to the lot mortgaged to the third;

[1] Schryver *v.* Teller, 9 Paige, 173.
[2] Marsh *v.* Pike, 1 Sandf. Ch. 210; 10 Paige, 595.
[3] La Farge, &c. *v.* Bell, 22 Barb. 54; Knowles *v.* Lawton, 18 Geo. 476.
[4] Cheever *v.* Fair, 5 Cal. 337.

(*u*) Where a purchaser of land mortgages it back for the price, and also assigns a note and chattel mortgage for further security, the mortgagee is not obliged first to resort to the latter. Davis *v.* Rider, 5 Mich. 423.

The right referred to in the text is said to be not a legal but an equitable right, and to depend upon the mortgagee's having *notice* of the partial alienation. La Farge, &c. *v.* Bell, 22 Barb. 54; 4 Seld. 276. So it is held, that the right of a purchaser of mortgaged lands, to have the mortgage satisfied by the sale thereof in the inverse order of their alienation, arises only when the mortgagee releases a portion without notice, or what is equivalent to notice, that another portion had been previously sold and conveyed by the mortgagor. Where the release itself refers to a conveyance of a part of the mortgaged lands, this is constructive notice of sale by their mortgagor. Booth *v.* Swezey, 4 Seld. 276.

A small portion of mortgaged premises was conveyed to A, and the mortgage was subsequently foreclosed by advertisement, without notice to the grantee, and the entire premises bid off by the assignee of the mortgage for more than the sum due on the mortgage, and the excess paid to the mortgagor. Held, A. was entitled to have the value of the larger part first applied upon the mortgage, and, if that equalled the amount due, the mortgage would be deemed satisfied; if not, he might redeem by paying the deficiency. St. John *v.* Bumpstead, 17 Barb. 100.

but should be paid from the proceeds of both lots, in proportion to the amount produced by each.[1]

74. Where the purchaser of mortgaged land assumes in the deed, or covenants, to pay the mortgage, especially if the amount is deducted from the price, he is liable to pay the amount of it to the grantor, as part of the price; as between them, the mortgagor becomes a surety in respect to the mortgage; (*v*) and at maturity the purchaser may be

[1] Green *v.* Ramage, 18 Ohio, 428.

(*v*) Although the language is used "*on condition* that said, &c., shall assume and pay said note," &c.; yet the grantor, after paying the interest, may recover it from the grantee. He is not bound to claim a forfeiture of the land; although he might do so at his election. And the promise is not void, as being within the statute of frauds — being a promise to pay the debt of another, or concerning real estate. Although the consideration is a conveyance of land, it is past and executed, and the promise is a simple obligation to pay money. And the substance of the contract is *with the plaintiff*, on a consideration moving from him, to pay his debt, although the performance of it would satisfy the debt of another. Moreover, *implied* promises are not within the statute. Pike *v.* Brown, 7 Cush. 133. And the rule is the same, whenever the land is conveyed subject to the mortgage, generally. Townsend *v.* Ward, 27 Conn. 610. If the grantee signs the deed, he is liable in *covenant;* otherwise, in *assumpsit*. Rawson *v.* Copeland, 2 Sandf. Ch. 251. The grantor may enforce the liability, without actually paying the mortgage debt himself. Ibid.

It has been recently held in Massachusetts, that the principle of law, by which, in some cases, an action has been maintained by one party, upon a simple contract made by the defendant with another to do an act for the benefit of the plaintiff, does not apply, in case of a promise made to the vendor by the purchaser of an equity of redemption, to assume and cancel the mortgage with the mortgage note; and that the mortgagee cannot maintain an action upon such promise. Mr. Justice Metcalf reviews the cases in which such a principle has been sanctioned by the Courts, and comes to the conclusion, that they constitute exceptions to the general rule on the subject, none of which embraced the case before the Court. Mellen *v.* Whipple, 1 Gray, 317. More especially does this rule apply, where it does not appear that the grantor is personally liable for the mortgage debt. King *v.* Whitely, 10 Paige, 465; Stevenson *v.* Black, Saxt. 338; Tichenor *v.* Dodd, 3 Green, Ch. 454. Even a guardian is held personally bound, where he purchases a mortgaged estate subject to payment of the mortgage debt. Woodward's, &c., 38 Penn. 322.

compelled to pay it. So a subsequent purchaser from him. As between him and the vendor he makes the debt his own. But, the vendor still remaining liable to the mortgagee, the relationship of principal and surety arises between the vendor and purchaser, and may be illustrated by the analogous case of an undertaking by one partner to pay the debts of a dissolved partnership. Such debts are thereafter regarded in equity, between the partners, as the debts of the undertaking party; and the continuing liability of the others is, in the same point of view, a liability for the debt of another.[1] A second grantee, taking the land from such purchaser, and the holder of the other part of the land, may claim an assignment of the mortgage to protect his rights.[2] But one purchasing subject to a mortgage may still make any legal defence to a suit thereupon.[3]

75. Where a mortgagor conveys distinct portions of the land to two successive purchasers, the last of whom reserves enough of the price to pay the mortgage, and expressly for that purpose; and such second purchaser accordingly pays the mortgage debt, taking a quitclaim deed from the mortgagee: this is a redemption of the mortgage as to the first purchaser.[4]

76. Where a part of land mortgaged is sold, and an agreement to pay the mortgage contained in the deed, a purchaser from such grantee is chargeable with notice of the agreement, and takes subject thereto; and if such purchaser buy the original mortgage, it is thereby discharged.[5]

77. If the purchaser of a portion of the land agrees with the mortgagor, that this portion shall remain subject to the lien, and this agreement makes a part of the consideration; equity will not decree that the portion retained by the mortgagor shall be first sold; even in favor of a purchaser from the first purchaser, having notice of the agreement.[6]

[1] Blyer *v.* Monholland, 2 Sandf. Cha. 478; Ferris *v.* Crawford, 2 Denio, 595; Morris *v.* Oakford, 9 Barr, 499, 500; Flagg *v.* Thurber, 14 Barb. 196; Andrews *v.* Wolcott, 16 Barb. 21; Marsh *v.* Pike, 1 Sandf. Ch. 210; 10 Paige, 595. See Dutton *v.* Ives, 5 Mich. 515.

[2] Halsey *v.* Reed, 9 Paige, 446.

[3] Russell *v.* Kenney, 1 Sandf. Ch. 34.

[4] Cushing *v.* Ayer, 25 Maine, 383.

[5] Russell *v.* Pistor, 3 Seld. 171.

[6] Engle *v.* Haines, 1 Halst. Cha 186; Ross *v.* Haines, Ibid. 632.

78. Where a purchaser of one of two mortgaged lots agrees to pay the mortgage; a subsequent purchaser of the other has a right to the fulfilment of this contract, notwithstanding an agreement between the vendor and the first purchaser, subsequent to the second sale, to vary such original bargain.[1]

79. Two persons having bought land subject to a mortgage, which they assumed to pay, one sold his share to the other, who agreed to pay the mortgage, and gave a bond of indemnity against it. Held, the seller might in equity enforce such agreement, or himself pay the debt, take an assignment of it, and file a bill to foreclose. Also that the defendant was estopped to set up a payment made by the plaintiff before he parted with his interest.[2]

80. If a mortgagor convey one of two parcels included in the mortgage, taking back a mortgage for the price, and, while this is unpaid, convey the other parcel to another purchaser, and then become insolvent; if the first grantee will not contribute to redeem both parcels from the original mortgage, the second, upon paying the whole debt, may claim an assignment of that mortgage, and thus enforce contribution.[3]

81. A mortgagor of two tracts of land conveyed one to the plaintiff and the other to A., who assumed the mortgage-debt. A. failed to pay the debt, but conveyed, by quitclaim, to B., who verbally agreed to pay the mortgage. After possession taken for foreclosure, B. took an assignment of the mortgage, three years having expired, and sold the A. tract to C., and the plaintiff's tract to D. Without notice, the plaintiff brings a bill in equity against B. and D., praying for a conveyance of the land to him. Held, the bill could not be maintained.[4]

82. Where that portion of the land conveyed by the mortgagor is to be only secondarily liable for the mortgage debt, the relation of principal and surety is reversed from that above stated. Thus A. purchased of B. one of several par-

[1] Baring *v.* Moore, 4 Paige, 166.
[2] Cornell *v.* Prescott, 2 Barb. 16.
[3] Allen *v.* Clark, 17 Pick. 47.
[4] Shaw *v.* Gray, 23 Maine, 174.

cels of mortgaged land. B. became insolvent, and made an assignment of his property, in trust for the payment of his debts, the lands assigned being first chargeable with the payment of the mortgage, but imperfect security therefor, and A.'s parcel being chargeable, in case the land assigned should prove insufficient. Held, A. was in legal effect surety for the land assigned, that, when sold upon foreclosure of the mortgage, it should satisfy the mortgage; and that he had a right to see that the principal fund was not impaired by any waste on the part of the assignees.[1] (*w*)

83. Where real estate, subject to mortgage, is owned by several persons, and the interest of one sold at sheriff's sale, the purchaser is not thereby personally chargeable with a proportion of the mortgage debt, to one of the original owners who paid it after the sale, in the absence of proof that he was permitted to become the purchaser, on the condition of his assuming such responsibility. His mere declarations, made either before or after the sale, that he was bound to pay part of the said mortgage debt, are too slight to create such a liability, without proof of consideration for the promise, and especially if made after his interest in the property had ceased, by reason of the sale of the same on a prior mortgage.[2]

84. Where mortgaged land is sold on execution against the mortgagor, as between him and the purchaser, it becomes the primary fund for payment of the mortgage.[3] In such case, the mortgagor's personal liability becomes separated from the ownership of the land, and from the remedy upon the mortgage against the land. And a judgment in favor of the mortgagor, in a suit brought upon the bond after such

[1] Johnson *v.* White, 11 Barb. 194.
[2] Wager *v.* Chew, 15 Penn. 323.
[3] Weaver *v.* Toogood, 1 Barb. 238.

(*w*) In New York it is held, that, if a deficiency exists, on foreclosure, the mortgagee may recover it from the grantee of a part of the land mortgaged. Halsey *v.* Reed, 9 Paige, 446.

sale, could not be pleaded by the purchaser of the mortgaged premises, by way of estoppel, in bar of a suit for foreclosure.[1]

85. In Gill *v.* Lyon,[2] the defendant was a purchaser from the mortgagor of part of the land mortgaged, and had paid the full value of the land, and took a deed with covenants of seisin and freedom from incumbrances. After this conveyance, the plaintiff bought the rest of the land, at a sale on a judgment against the mortgagor. Held, the defendant was not bound to contribute towards redeeming the mortgage, because the parties were not on an equal footing in equity.

86. So where there are two mortgages upon the same property, and the holder of the prior mortgage forecloses, and purchases in the property, the presumption is, that he bids only to the value of the equity of redemption; and thenceforth the land becomes the primary fund for payment of the debt secured by the senior mortgage.[3] (*x*)

87. So where a mortgagee recovers judgment on the debt, and the mortgagor afterwards conveys land not included in the mortgage, and subject to the lien of the judgment; the grantee may in equity oblige the mortgagee to apply the mortgaged premises first to his debt.[4] (*y*)

[1] Heyer *v.* Pruyn, 7 Paige, 465.
[2] 1 Johns. Ch. 447.
[3] Mathews *v.* Aikin, 1 Comst. 595.
[4] Weaver *v.* Toogood, 1 Barb. 238.

(*x*) A mortgage was made of an interest in certain mills, to secure $4,000, and a conveyance of other land to the mortgagee, absolute in form, but in fact as security for $6,000. The mortgagee assigned the mortgage and conveyed the land to the same person, with notice of the prior transaction. The grantee foreclosed the mortgage, and upon the sale purchased the mills, and afterwards mortgaged the whole property to the first mortgagee for $10,000. Held, the last mortgage was an equitable lien on the land only for $6,000 and interest, deducting the rents and profits. Williams *v.* Thorn, 11 Paige, 459.

(*y*) Upon this subject, the following points have been recently settled in Kentucky. Where land and slaves are included in a mortgage, and parts of the property sold to different persons; in equalizing the burden among the purchasers, the equitable course is to apportion it according to the values at the time of foreclosure; but not to take into consideration improvements *bonâ fide* made by the purchasers. Dickey *v.* Thompson, 8 B. Mon. 312.

88. It is said, that a mortgagee, with notice of subsequent liens, has no right to *release* his mortgage, to the prejudice of such liens.[1] (z) Upon this principle it has been held, that if the mortgagee, for a consideration, releases that portion of the land which was primarily liable for the debt, he thereby discharges the other portion.[2] So, if two estates be mortgaged in one deed, and transferred to different persons, and one released by the mortgagee; the owner of the other, on redeeming, cannot compel contribution, but may claim a deduction from the debt in proportion to the value of the parcel released.[3] And it is held that a mortgagee cannot release a part of the premises mortgaged to him, and throw the whole burden upon the remaining part, if the remaining part has been subsequently mortgaged to another whose mortgage has been recorded, though the first mortgagee had not actual notice of the second mortgage.[4]

89. But, on the other hand, it is said, the rule of charging different parcels of land, subject to a common incumbrance, in the inverse order of their alienation, is a mere rule of equity; and, as a release to a subsequent purchaser, of one parcel of the land, is not a technical discharge of the

[1] McLean *v.* Lafayette, &c., 3 McL. 587; La Farge, &c. *v.* Bell, 22 Barb. 54.
[2] Paxton *v.* Harrier, 11 Penn. (1 Jones) 312. But see Holman *v.* Bank, &c., 12 Ala. 369.
[3] Parkman *v.* Welch, 19 Pick. 238.
[4] Johnson *v.* Johnson, 4 Halst. Ch. 561.

Where a mortgagor sells part of the property, agreeing to pay the mortgage, it shall first be paid from the part which he retains, if any, before calling upon the purchaser of another part. Ibid.; acc. Cumming *v.* Cumming, 3 Kelly, 460. Where parcels of land, belonging to different purchasers, are charged with an incumbrance, each should bear its proportion thereof, according to its value, if each purchaser paid a full price, expected to hold the land clear, and made no engagement to pay the incumbrance. The burden cannot be thrown wholly upon the purchaser of the last lot. Ibid.

(z) In Delaware, the release by the mortgagee or his assigns, executed at the instance of the mortgagor, his heirs or assigns, of any part of the mortgaged premises, shall not operate as a discharge of any other part. Every such release shall be under hand and seal, acknowledged like other deeds, and recorded within sixty days. Laws of Delaware, 1859, 698.

lands previously conveyed from the incumbrance, it is not an equitable release, except where it ought so to operate upon equitable principles.[1] Thus, where a purchaser of part of land mortgaged paid the price to the mortgagee, taking a release of his land from the mortgage; held, that parts of the land previously sold were not discharged.[2] More especially where a mortgagee, whose mortgage covers two parcels of land, subsequently conveyed by the mortgagor to different purchasers, releases the parcel last conveyed from the mortgage, without any notice, actual or constructive, that the other parcel had been previously sold; he does not thereby discharge the parcel not released.[3] So, where the owner of mortgaged property conveyed a portion of it, received the price, and afterwards sold the remainder for the full value to another person, under an agreement that the purchase-money should all be applied upon the mortgage, and the land released therefrom; and the mortgagee accordingly released it; held, such release did not discharge the portion first conveyed from the lien of the mortgage for the balance of the debt.[4]

90. The recording of his deed, by a grantee from the mortgagor, is held no notice to the mortgagee of the existence of such deed, so as to exempt the land granted from liability for the mortgage debt, by reason of a release of the land primarily liable.[5] And more especially where the act, making the record of conveyances notice, is limited by its terms, in its operation, to *subsequent* purchasers and mortgagees. And though the act imports notice to prior purchasers or mortgagees, it is but constructive notice, and insufficient to charge a prior mortgagee with fraud, in releasing portions of the mortgaged premises (of which part had been sold after the mortgage, but before his releases), retaining a lien on the balance, so as to justify relief in a court of equity.[6] And searches made by a solicitor, with a view to foreclose a

[1] Patty *v.* Pease, 8 Paige, 277. See Lyman *v.* Lyman, 32 Vermt. 79.
[2] Evertson *v.* Ogden, 8 Paige, 275.
[3] 8 Paige, 277; Stuyvesant *v.* Hall, 2 Barb. Cha. 151.
[4] Patty *v.* Pease, 8 Paige, 277.
[5] 4 Sandf. 565.
[6] Dennis *v.* Burritt, 6 Cal. 670.

mortgage, which proceeding was abandoned after a bill was prepared, but before it was filed, are not evidence of notice to the mortgagee of the facts which they disclosed.[1]

91. But where a release of mortgaged premises described a part of the lands released, by reference to a deed to the releasee, which bounded the land upon "land now or late of W.," and "along said W.'s land;" held, notice to the mortgagee, that W. was or had been the owner of such adjoining lands. And such lands being a part of the mortgaged premises, and having been conveyed by the mortgagor to W., long before the execution of the release; held, the mortgagee was chargeable with notice of such conveyance, and must account for the value of the released premises in discharge of the mortgage debt, as between himself and W.'s grantees.[2]

92. Where the part last conveyed was equal in value to the debt, and the purchaser bought in the mortgage debt, took an assignment of the mortgage, and foreclosed the same, and then, under a claim of title to the whole tract, released to the purchaser of the first sold portion his, the assignee's, right in this portion, upon being paid therefor; held, the releasee could not, at law, recover back the money, though paid under a belief that the releasor had title to the whole tract. Whatever be the right of the releasee, his remedy is in equity alone.[3]

93. When a mortgagee has released land primarily liable, to the prejudice of another mortgagee of a part only of the lands embraced in the first mortgage, equity may prevent the first mortgagee from enforcing his mortgage upon the portion of lands common to both mortgages, unless he deducts from the debt the value of the land released. But he must have knowingly and wilfully prejudiced the other mortgagee's rights; and a record of the second mortgage is not legal notice.[4]

94. A. mortgaged certain property to B., and others, to

[1] Howard, &c. *v.* Halsey, 4 Sandf. 565.
[2] Ibid.
[3] Ibid.
[4] Blair *v.* Ward, 2 Stockt. 119.

secure debts due them by him, and at the same time A. and his wife C. mortgaged to them property belonging to C. in her own right, from her father's estate, as a further security for A.'s debts to B. C. died before partition of her father's estate, and her portion was attached by the committee of partition to her son D. These mortgages were recorded May 3d, 1837. On February 12, 1839, B. and his co-mortgagees released a portion of C.'s property covered by the mortgage, but this release was not recorded until January 16, 1840. In February, 1839, A., as guardian of D., conveyed to the co-mortgagees with B., but without prejudice to B.'s rights, a part of D.'s estate in satisfaction of their interest in the mortgage; and, in December, 1840, they released to A. all their title and interest, without prejudice to B.'s rights. July 10, 1839, A. mortgaged, as guardian of D., and by authority properly obtained, a part of D.'s estate to E., which mortgage was recorded July 19, 1839. February 6, 1840, B. bought from A. his equity of redemption in the estate covered by his first individual mortgage, whereby, as B. admitted in his pleadings, his estate as mortgagee was merged in the fee-simple. B. brought his bill to foreclose his mortgage on the estate of C., which had descended to D. E. filed a cross-bill, to exempt the lot mortgaged to him by A., as guardian of D. from liability to B., and alleged that he had no notice, when he took the mortgage of the release of a part of C.'s property from the mortgage. Held, the record of the second mortgage to E. was not constructive notice to B. and his co-mortgagees, so as to affect their right to proceed against the remainder of the premises, which was left covered by the mortgage after the release of a part to C., but, as C. was to be regarded as a surety for A., in her mortgage with him to B. that he was obliged first to proceed against the primary fund, which in this case was A.'s property, and, as he had purchased A.'s equity of redemption therein, he must first deduct the price at which he took A.'s property from the mortgage-debt, and then, if there was a balance due, he could proceed against the surety's

property. As the mortgage-debt was more than extinguished by A.'s property, B.'s bill was dismissed with costs, and the property was decreed to be sold by a decree under the cross-bill to satisfy E.'s mortgage.[1]

95. A mortgage was made of twenty-seven acres, and another of ten acres, part of the land previously mortgaged. The latter was sold by the second mortgagee, and released by the first. The mortgagor then sold three acres of the remaining seventeen, by a warranty deed. Held, an assignee of the first mortgage could not sell the three acres, until he had sold the fourteen not released, and then only for the deficiency.[2]

96. The assignment of a security to the owner of one parcel of land upon which it is an equitable lien, for the purpose of enabling the assignee to obtain payment from another parcel, which in equity is primarily liable; operates as a merger of the lien in equity only as to the lands primarily chargeable.[3]

97. It has been held in Vermont, if several parcels are mortgaged for one debt, and a third person becomes interested in one of them, from necessity, or otherwise than in the way of voluntary speculation; that he may either require of the mortgagee an equitable apportionment of the debt, or an assignment of the mortgage on payment of it; in either case, reference being had to such property only as was equitably chargeable, where he became interested in the property.[4] But this rule has been since questioned, and it has been held, that, in case of mortgages of several tracts, the mortgage is to be apportioned upon the land according to value, and each owner to have a certain time for redeeming his part, or to be foreclosed. If one only redeems, he must also redeem the other part, or forfeit the whole. If he redeems the whole, he takes it himself.[5]

98. Where some of the defendants in their answers insist

[1] Wheelwright *v.* Loomer, 4 Edw. Ch. 232.
[2] Mevey, 4 Barr, 80.
[3] Skeel *v.* Spraker, 8 Paige, 182.
[4] Honie *v.* Chittenden, 1 Verm. 28.
[5] Gates *v.* Adams, 24 Verm. 70.

that the estates of others shall be first charged with the debt, and the latter are defaulted; the court will not determine the order of sale, but direct the master to sell in inverse order, and conformably to equity.[1]

99. A mortgagor of several lots sold one of them. The assignees of the mortgage brought a bill to foreclose, making all incumbrancers parties except the purchaser of this lot. A sale was decreed, and the lot was sold, and bought by one of the assignees, and the price nearly satisfied the mortgage. The assignee brings ejectment for the lot, and recovers judgment. The purchaser of the lot then brings a bill to redeem, in payment of the balance of the mortgage. Held, he must also pay the price paid for the lot.[2]

100. The following case illustrates the several points above considered, as to the respective rights of the various parties interested in a mortgaged estate. January 1, 1817, a mortgage was made by one of the defendants to the plaintiff to secure a note for $1,116. The other defendant purchased the right of redemption, and filed a bill, setting forth that the mortgage included two lots of land, of very different values; that lot No. 1, being the less valuable one, had been sold to him in November, 1821, upon an execution against the other defendant, and himself, as security for the other defendant, for $175; and praying that the mortgage debt due to the plaintiff might be apportioned between the lots according to their comparative values, and lot No. 1 discharged from the mortgage upon payment of the amount thus charged upon it; or that the plaintiff might be decreed to accept his debt from the purchaser, and assign the mortgage to him. It appeared that in July, 1821, the mortgagor sold No. 2, the plaintiff verbally promising to release it from the mortgage. In February, 1822, after the purchase of No. 1, the plaintiff, without consideration, accordingly made a release. Upon a bill in equity to foreclose, brought by the mortgagee against the mortgagor and purchaser, held, the case was not one

[1] Rathbone *v.* Clark, 9 Paige, 648. [2] Gliddon *v.* Andrews, 14 Ala. 783.

where the purchaser, as a party interested in one of two mortgaged estates, might by the aid of a court of equity throw the burden upon the other, because the plaintiff's interest would be thereby affected; but that the purchaser was entitled to relief, either by paying the mortgagee his debt, and taking a conveyance of all the property subject to the incumbrance; or by paying such proportion of the debt, as the value of his purchase bore to that of the whole property; that the Court were bound to regard the equitable situation of the property at the time of the purchase, taking into view the mortgagee's verbal agreement to release a part of it, as any other course would be punishing him for the benevolent act of relinquishing a part of his security; and that the purchaser, not being a mere speculator or volunteer, but having purchased by reason of having been bail for the mortgagor, was entitled to the privilege, which the mortgagee would otherwise have had, of electing between the two modes of relief above specified.[1]

[1] Chittenden *v.* Barney, 1 Verm. 28.

CHAPTER XIV.

FROM WHAT FUND A MORTGAGE SHALL BE PAID, UPON THE DEATH OF THE MORTGAGOR.

1. General nature of the subject — general rules as to the fund for payment of a mortgage — decided cases — miscellaneous points and decisions.

1. Having treated, in the several preceding chapters, of the respective titles and interests of mortgagor and mortgagee, involving of course the question, whether those interests come under the head of real or personal estate; the natural succession of topics leads us to consider the disposition which the law makes of a mortgagor's property after his death, in relation to payment of the mortgage debt; or, in other words, the *fund* from which that debt shall be paid. This will be the subject of the present chapter. It is of far less importance in the United States than in England, because in this country the law makes substantially the same disposition of the real and personal property of one deceased. Consequently, in the American Reports, very few cases, comparatively, are to be found, where questions of this nature have arisen. They have, however, occasionally occurred, and any view of the American law of mortgages would be incomplete, without containing a general view of this particular topic.

2. The general principles relating to this subject may be thus stated.

3. It is a rule in equity, that, where one dies leaving a variety of funds, and a debt which must be paid from them, payment shall be made from that fund *which had the benefit of the money.* Hence a mortgage upon real estate, in the hands of the heir or of a devisee, shall be paid out of the

personal estate in the hands of the executor; because the latter was increased by the money for which the mortgage was made. (*a*) And this principle is adopted, though the

(*a*) The rule in question is to some extent predicated upon the theory and definition heretofore alluded to, (p. 1,) which makes *borrowed money* an essential element of a mortgage. In addition to the exceptions which will be presently stated, it would seem that the rule ought not to apply in any case where the mortgagor's personal estate is not augmented by making the mortgage, as in the common case of buying land, paying part of the price, and mortgaging back for the rest; the whole of which operation, taken together, diminishes, instead of increasing the personalty.

Upon a sale by the mortgagee for the purpose of foreclosing; if in the lifetime of the mortgagor, the surplus, after satisfying incumbrances, is personal estate; if after his death, it belongs, with the equity of redemption, to the heir. Wright *v.* Rose, 2 Sim. & Stu. 323.

During the mortgagor's life, the land is said to be the primary fund for payment. Gilbert *v.* Averill, 15 Barb. 20.

So where a mortgagor conveys the land, subject to the payment of the mortgage by the purchaser, the land is the primary fund therefor, and is not discharged by a release from the mortgagee to the mortgagor of his personal liability. Tripp *v.* Vincent, 3 Barb. Ch. 613.

The purchaser of land, subject to the payment of a mortgage, must rely on the land for payment, and cannot make a personal claim against the mortgagor. Cherry *v.* Monro, 2 Barb. Ch. 618.

Land was conveyed to two persons, who gave back a joint bond and mortgage for the price. One of them afterwards conveyed to the other his moiety, subject to the mortgage, the latter agreeing to pay the bond and mortgage, and giving the former a bond of indemnity against it. The latter then conveyed the whole to another person, by a warranty deed; and subsequently became insolvent, and failed to pay the bond and mortgage. The mortgagee being about to foreclose, the last purchaser induced him to bring an action against the joint mortgagor, who had transferred his interest to the other, upon the bond. A rule *nisi* for judgment having been obtained against the defendant in that suit, he tendered to the plaintiff the amount due, with interest and costs, and demanded an assignment of the bond and mortgage to a third person, that he might enforce them upon the land. The plaintiff, in collusion with the purchaser, refused to receive the money and make the assignment. The defendant thereupon files the present bill in Chancery against both these parties. Held, he might in equity require the mortgagee to resort to the land for payment, and to be subrogated in the place of the mortgagee to his remedy against the land. Ibid.

land be devised subject to the incumbrance, or the personal estate bequeathed, or the land expressly charged with debts, or the real estate limited in trust, either in fee or for a term, for payment of debts.

So, where an equity is sold on execution, the land is the primary fund. 2 Cruise, 146.

A mortgage debt must be paid out of the personal estate of the mortgagor, and, if that is not adequate, then the balance should be paid out of that portion of the real estate contained in the mortgage. Goodburn *v.* Stevens, 1 Maryland Ch. Decis. 420.

But a mortgagee may resort to the mortgaged property, after the death of the mortgagor, without going into an account of the personal assets. Patton *v.* Page, 4 Hen. & Mun. 449. And the administrator of an insolvent estate is neither required nor allowed to apply the personal assets to the redemption of a mortgage made by the intestate. Gibson *v.* Crehore, 5 Pick. 146.

An administrator, after representing the estate insolvent, sold real estate, under a license, and applied the proceeds in full payment of a debt secured by mortgage of such estate, which was duly recorded, but previously unknown to him and the purchaser; charging himself in his account with only the balance. Held, he was justified in so doing; inasmuch as he could not make a good title to the estate, without extinguishing the mortgage, the estate itself being sold, and not a mere equity of redemption. The mortgagee was not bound to relinquish his security and receive a mere dividend, but could hold it till paid in full. Church *v.* Savage, 7 Cush. 440.

Devise of the A. estate, subject to debts, &c., to the wife for life, remainders over; and of the B. estate, subject, &c., to her absolutely. The testator afterwards mortgaged the former estate. The personal property being deficient, held, the two estates should contribute ratably to the payment of the mortgage. Middleton *v.* Middleton, 21 Eng. Law & Eq. 542.

Where notes are secured by mortgage, and the mortgagor devises part of the premises and sells the rest, and dies; the holder of the notes loses no rights under the mortgage by failure to present them to the executor for payment within the time required by law, in order to hold the executor; and there is no distinction between the case of a mortgagee in possession and that of one out of possession of the mortgaged premises. Inge *v.* Boardman, 2 Ala. 331.

In New Hampshire, an administrator must redeem a mortgage, unless licensed to sell subject thereto. Rev. Sts. 318. In Missouri, the Court may order redemption with the personal assets, if the will makes no provision therefor, and it will be beneficial to the estate, and not injurious to creditors; otherwise, the Court may order a sale of the equity. Missouri Sts.

4. If the personal estate is deficient, a mortgage shall be discharged from the proceeds of land devised for payment of debts. And where one estate descends and another subject to mortgage is devised, the mortgage shall be paid from the former. (*b*)

(*b*) It is said, there are four classes of estates to be applied in discharge of mortgage debts: first, the general personal estate, unless specially exempted or specifically bequeathed; secondly, real estates particularly devised for payment of debts, which may be so devised as to form a mixed fund with the first; thirdly, real estates descended, whether purchased before or after the date of the will; fourthly, real estates specifically devised, charged with payment of debts. Coote, 547.

The devisee of an estate in mortgage may call on an estate devised for payment of debts, to indemnify him. So upon estates devised, and charged with payment of debts. So although the estate is devised subject to incumbrances. Ib. 544. So the descended estate shall exonerate the mortgaged estate devised. And the like will be the case, if the personal estate is exempted from payment of debts, and the mortgaged estates devised subject to incumbrances, and other parts of the real estate suffered to descend to the heir. Ibid.

After the personal estate is exhausted, estates expressly devised for payment of debts will be next applicable. This rule, however, will not apply to estates specifically devised charged with payment of debts. Ib. 545.

If the owner of several leasehold estates mortgage one of them, and then bequeath them separately to different legatees, and direct payment of his debts from his residuary personal estate, which proves insufficient for that purpose; the legatee of the mortgaged estate takes it, *cum onere*, and cannot call for a contribution from the others. Halliwell *v.* Tanner, 1 Russ. & My. 633.

But where several estates, separately mortgaged, were specifically devised to different persons, with directions that the mortgages should be paid from the personal estate, which proved insufficient to pay the mortgage and other debts; a decree was passed, that the mortgage and other specialty debts should first be paid from the personal assets *pro ratâ*, the residue of the mortgage debts borne by the respective estates on which they were charged, and the deficiency of the other specialty debts, and the simple contract debts, borne by the several devised estates and specific legacies *pro ratâ*. Symons *v.* James, 2 Y. & Coll. 301, N. S.

In New York, under the Revised Statutes, upon the death of a mortgagor, the real estate is primarily chargeable in the hands of the heir or devisee, unless the will make provision for another mode of payment. Halsey *v.*

5. If, however, the will either expressly provide, or contain provisions from which a clear intent may be inferred, that the mortgage debt shall fall upon the real instead of the personal estate; the law will carry it into effect. So the specific bequest of a chattel will exempt it from application to a mortgage debt.

6. In the case of Haven *v.* Foster,[1] Morton, J., remarked "By the common law, the heir is entitled to the aid of the personal property of the mortgagor in paying off mortgages: but if the heir, without making application for aid in redeeming, disposes of the mortgaged estate, he cannot afterwards come upon the personal estate for assistance. And no authority was cited or has been found, which requires the administrator in England to redeem mortgaged estates in foreign countries. But, on the contrary, it is very clear, that such administrator would have no power to do any act, as such, out of the kingdom. So an executor or administrator, appointed in this State, has no authority beyond its limits. He would have no power to make a tender in any other

[1] 9 Pick. 133, 134.

Reed, 9 Paige, 446; N. Y. Rev. Sts. 749. In 1824, the intestate gave a bond, secured by mortgage. The land was sold subject to payment of the mortgage, and conveyed to a trustee for the benefit of the wife of the intestate. After his death, the *cestui que trust*, being legal owner under the Revised Statutes, administered upon the estate. Held, in equity, the land was the primary fund for the payment of the mortgage, and the administratrix, owning subject thereto, was not allowed for a payment of the mortgage. Jumel *v.* Jumel, 7 Paige, 591.

In Pennsylvania, where land is mortgaged for the payment of the widow's share of the valuation of the property of an intestate, under an inquest from the Orphans' Court; the mortgagee may resort to the mortgagor's personal property, and is not restricted to the land. Mansell, &c., 1 Parsons, 371.

In Maryland, the devisees of mortgaged property have a right to call on the executor to redeem, to the extent of the excess, where the personal property is more than sufficient to pay debts. But they have no such equity, as against devisees of other property. Gibson *v.* McCormick, 10 G. & J. 66.

State, nor could he resort to any legal process, to compel the mortgagee to accept a satisfaction of the debt or discharge the mortgage. The law imputes negligence to no man for not doing that which he has no legal power to do. It is true, that if the mortgagee had chosen, he might not only have compelled the administratrix to pay out of the estate here, but he might voluntarily have accepted payment of her, and given her a valid discharge. But he could not have been compelled to do either. He had the power, at his own election, either to commence process upon the mortgage itself, or to take out administration in the State where the mortgaged land was, and in the one way or the other to obtain satisfaction of the debt from the estate itself. As the administratrix had not the power to prevent him from adopting either of these courses, so her omission to do it, or to attempt to do it, did not amount to waste."

7. The rule above stated, (§ 2,) being founded on the consideration that the debt was originally a personal one, and the charge on the land only collateral, does not apply, where the mortgage debt was contracted by one person, and the land descends to another, who also dies, leaving it a part of his estate. Thus if a grandfather make a mortgage, with a covenant to pay the money, and the land descend to his son, who dies without paying the mortgage, leaving personal estate and a son; the mortgage shall not be paid from the father's personal estate. So where one covenants to pay the debt of another, which is secured by mortgage, the personal estate of the former will not be applied in the first instance to payment of the mortgage. And even though one expressly charge his real and personal estate with his debts, the latter will not be liable to the payment of a mortgage made by another.

8. So where one purchases land subject to mortgage, his personal estate will not go to pay it, even though he have expressly covenanted for its payment, unless an intention be proved to make the debt his own. If husband and wife join in mortgaging her land, and he has the benefit of the money:

it shall be first repaid from his personal estate. But where money is borrowed on her estate, partly for his use and partly to pay her debts; he is not bound to indemnify her estate against any part of it. Nor will his personal estate be liable, if it appear not to have been her intention to stand as a creditor for the mortgage-money.[1] (*c*)

[1] 2 Cruise, 146–175.

(*c*) The following cases illustrate the principles above stated in the text of this chapter. (See also 1 Hill. on R. P. 431–433; Mason, &c., 1 Parsons, 132; Mansell, &c. Ibid. 370; Driver *v.* Ferrand, 1 R. & My. 681; Kirke *v.* Kirke, 4 Russ. 435; Jones *v.* Bruce, 11 Sim. 221; Ouseley *v.* Anstruther, 10 Beav. 453; Symons *v.* James, 2 Y. & C. N. R. 301; Hewett *v.* Snare, 1 De Gex & Sm. 333; Merselis *v.* Veeland, 4 Halst. Ch. 575.) A testator, having purchased an annuity out of lands mortgaged, and for his own protection taken an assignment of the mortgage, directed in his will that the mortgage debt should be paid from the personal estate; and it was decreed accordingly; "chiefly for that Pockley (the testator) by his will, which were the words of a dying man, *had declared it to be his debt*, and appointed it to be paid out of his personal estate." Pockley *v.* Pockley, 1 Vern. 36. A person having a life-estate, with power to settle a jointure upon his wife, covenanted to make such settlement, but died without doing it. Upon a bill brought against his heir for a specific execution, it was held, that the assets of the deceased should not be applied to relieve the estate settled, because the debt did not originally charge the personalty. The covenant remained as a real lien on the estate, and the personal estate could not be applied, because there was no debt from which this estate was to be relieved. Coventry *v.* Coventry, 9 Mod. 12; 2 P. Wms. 222; Str. 596. A person having died after making a mortgage of his estate, his daughter and heir married, and her husband settled the estate by fine on himself and his wife, joined in an assignment of the mortgage, and covenanted to pay the money. After his death, held, his personal estate should not be applied to pay the mortgage, as the covenant was not intended to change the nature of the debt, but only as an additional security to the mortgagee. Bagot *v.* Oughton, 1 P. Wms. 347. A father having made a mortgage, his son covenanted with an assignee of the mortgage to pay the debt. Upon the death of the father, the son by a settlement succeeded to the estate. The latter having died intestate, held, the debt should not be paid from his personal assets, because the debt was still that of the father, and the covenant of the son was a mere security. Evelyn *v.* Evelyn, 2 P. Wms. 659. See Ancaster *v.* Mayer, 1 Bro. 454; Leman *v.* Newnham,

9. If one, having several leaseholds, mortgage one of them, and then bequeathe them separately to different parties, and

---

1 Ves. 51. In the case of Parsons *v.* Freeman, Ambl. 115; 2 P. Wms. 664, n., it was said by Lord Hardwicke, that, where an ancestor has not personally charged himself with the mortgage debt, the heir shall take *cum onere*. So if one purchase the equity of redemption, with usual covenants to pay the mortgage, he was inclined to the opinion, though he knew of no case which decided the point, that the heir could not claim to have the land relieved. But where, as in that case, the purchaser agreed with the seller to pay a part of the price to him, and the rest to the mortgagee, this made the debt his own, and it should be first paid from the personal estate. (It is supposed by Chancellor Kent, (Cumberland *v.* Codrington, 3 Johns. Ch. 266, 267, a case of extraordinary learning and value,) that this case is imperfectly reported, no facts being stated, and a very brief note of the opinion. He remarks, that as it stands it is repugnant to most of the cases before and after it, and even to another decision of Lord Hardwicke himself, made soon afterwards. Thus in Lewis *v.* Nangle, (Amb. 150, 2 P. Wms. 664, n.,) an estate subject to mortgage having come to a married woman, the husband borrowed money upon a bond and mortgage, in which she joined, and the money was applied partly to pay her debts and partly for his use. There was a covenant by the husband to pay the whole debt. Lord Hardwicke held, that, according to the presumed intention of the parties, the land was the primary fund for payment, and the husband was not bound to relieve it.) In the case of Forrester *v.* Leigh, Ambl. 171; 2 P. Wms. 664, n., a testator had purchased several mortgaged estates, and covenanted to pay one of the mortgage debts. He purchased a part of another of the estates, and he and his co-purchaser covenanted to pay their several shares, and to indemnify each other. Held, by Lord Hardwicke, as between legatees and devisees of the testator, the debt should be paid from the land.

A mortgagor conveyed the estate with warranty, except as against the mortgage, providing also that the mortgage debt should be paid by the purchaser from the purchase-money. An indorsement acknowledged payment of a part of the price on perfection of the deed, and the rest *allowed on account of the mortgage*. The purchaser by will gave a large personal estate to his wife, and also devised to her the mortgaged land for life, then to his oldest son George in fee, subject to debts and legacies, declaring that his wife should hold, free from incumbrance, and that George should pay the interest of the mortgage debt from other lands devised to him. After some legacies, he bequeathed the rest of his personal property, after payment of all his just debts, and all his real estate, to George, whom he appointed his executor. George paid the interest, but not the principal, of the mortgage debt.

direct his debts to be paid from his residuary personal estate, which proves insufficient for the purpose; the legatee of the

---

His mother also released her interest in the land to him. He made a will, giving small annuities to his younger sons; the mortgaged land, according to his estate therein, to his youngest son, William; and the principal part of his estate, which was very large, to his eldest son, Robert. After the death of George, Robert refused to pay the principal or interest of the mortgage debt, and, William being unable to pay it, the mortgage was sold, and afterwards the estate also, under a decree. William then filed a bill against the executors of the father (Robert being one) and of the grandfather, to have the mortgage debt paid from the personal assets, in relief of the land. Lord Chancellor Lifford decreed, that the mortgage debt was the debt of the grandfather at his death; and that his personal estate, which came first to the son and afterwards to the grandson, should be applied to pay it. This decree was affirmed in the House of Lords. Earl of Belvedere *v.* Rochford, 5 Bro. Parl. 299. (Chancellor Kent (3 Johns. Ch. 270, 271, 272) questions the binding authority of this decision. He remarks, that it has been disregarded or rejected by Lords Thurlow, Alvanley, and Eldon, and by Sir William Grant; and also that no precise account is given of the reasons upon which it proceeds; and that it may perhaps be considered as turning upon the construction of a will and its very special provisions.)

A mortgage was made to the plaintiff of a certain lot of land, and the mortgagor then devised all his estate, including many other lots, to the same devisee. The devisee devised the land mortgaged to one person, and the rest of her estate to her executors. The plaintiff having recovered judgment upon the bond secured by the mortgage, a motion was made, that the debt should be levied upon the land mortgaged, and the rest of the estate discharged. Held, all the lands of the mortgagor should contribute, according to their respective values; that the will of the first devisee showed no intention that the devisee of that will should take the estate *cum onere*, and therefore the mortgage debt should be satisfied equally from this and the other lands; and that as the latter devise was specific, to charge this devisee with the whole debt would plainly defeat the intention of the devisor, while charging the lands held by the residuary legatees would have no such effect. Morris *v.* McConnaughy, 2 Dall. 189.

A mortgagor having died, after devising the land, the devisee covenanted with the holder of the mortgage, that the land should remain bound for the debt and interest, with an addition of one per cent. of interest. After the death of the devisee, the question arose, whether the debt and interest, or at least the arrears of interest, with the additional one per cent., should be paid from his personal estate. Held, both the principal, the regular and

estate mortgaged must take it *cum onere*, and cannot claim contribution from the other legatees.[1]

[1] Halliwell *v.* Tanner, 1 Russ. & My. 633.

---

the additional interest, should be primarily charged upon the land. Shafto *v.* Shafto, 2 P. Wms. 664, n. 1.

In Tankerville *v.* Fawcet, 2 Bro. 57, Lord Kenyon declared, that where an estate comes to a person, subject to a mortgage, although the mortgage is afterwards assigned, and the party covenants to pay the money, his personal estate is not bound. And, a devisee having voluntarily charged a simple contract debt of the testator upon the land devised, and died; held, the debt was not the proper debt of the devisee, and his personal estate was not liable.

A purchaser of a mortgaged estate agreed with the mortgagor, as part of the consideration, to pay the debt to the son and heir of the mortgagee, and the rest of the price to the mortgagor. He also covenanted with the mortgagor to this effect, and that he would indemnify him from the mortgage. The purchaser having died, leaving a will, the devisee brings a bill in equity to have the mortgage discharged from the personal estate. Held, the bill could not be maintained; that the personal estate is never chargeable in equity, unless it is chargeable in law; that the purchaser took the estate subject to the charge, but the debt, as to him, was real, not personal; and that his contract with the mortgagor was a mere contract of indemnity, which the law would have implied, though not expressly made. Tweddell *v.* Tweddell, 2 Bro. 101, 152.

An estate held by a lease for lives, subject to a charge of £2,200 to one A., was conveyed subject to this charge, and to another of £900 to B., by an indenture to which A. was a party, and in which the purchaser covenanted to pay both charges. The purchaser paid the debt to B., and afterwards gave bond to pay A. the interest of her claim for her life, and the principal at his death. The lease having been repeatedly renewed, the purchaser died, having devised the estate to two of the defendants, and appointed two others of the defendants his executors. The charge being called in, and paid to a legatee of A. by the executors, the defendants were called on by the plaintiffs' pecuniary legatees, who were unpaid, to have the £2,200 replaced by the devisees of the land, and paid over to them. Held, notwithstanding the covenant by the purchaser to pay the debt, contained in an instrument to which A., the holder of the debt, was a party, and the subsequent bond, changing and extending the original time of payment, the nature of the debt was not altered, but it continued primarily a charge upon the land; that, though the purchaser became personally liable, this did not subject his personal estate, because no such intention appeared; and the

10. But where several estates, subject to distinct mortgages, were specifically devised to different persons, with a

---

defendants were decreed to pay over the money. Billinghurst *v.* Walker, 2 Bro. 604.

(It seems, to charge the personal estate, the assumption of the debt must be accompanied with evidence of an intention to assume it as a *personal* debt, detached, as it were, from the land. 3 Johns. Ch. 256.)

In the case of Mattheson *v.* Hardwicke, (2 P. Wms. 664, n.) there was a devise to two persons, charged with debts and legacies. One of the devisees paid the whole except one legacy, for which he gave his note. It appeared that he had paid off the other incumbrances, in order to relieve the land from them entirely. The devisee having died, held, the note was merely collateral security, and the land the primary fund for payment of the legacy.

(The question in many of the cases seems to be, not whether the party acquiring the estate mortgaged or charged has made himself personally liable for the debt, but whether the land or the personal estate shall be treated as the primary fund for payment. The distinction is, that where land is mortgaged as security for the mortgagor's own debt, the debt is the principal and the mortgage merely collateral. But the purchaser of a mortgaged estate, though he personally assume and covenant to pay the debt, is treated as a debtor only in respect to the land, and his promise is considered as made on account of the land, which therefore is the primary fund for payment. The cases establishing each of these propositions are said to be equally numerous and decisive. 3 Johns. Ch. 256, 257.)

The owner of land, having mortgaged it to raise money for his son, conveyed the land, subject to the mortgage, to the use of the son, who joined with his father in a covenant to pay the money. The land was afterwards reconveyed to the father, who covenanted to discharge the mortgage, and afterwards borrowed a further sum from the mortgagee, and made a new mortgage for the whole debt. A question arising between the heir and personal representative of the mortgagor, which should pay the debt; Lord Alvanley, Master of the Rolls, held, that though the debt belonged to the son primarily in equity, and to the father and son together at law, the father had made it his own; and that it was as strong a case as could exist without an express declaration. He was careful not to contradict in any degree the principle established in the case of Tweddell *v.* Tweddell, which was a very governing case. In that case there was no communication with the mortgagee, but only a covenant of indemnity, and the purchaser did not thereby personally assume the debt. Woods *v.* Huntingford, 3 Ves. 128.

In Butler *v.* Butler, (5 Ves. 534,) the purchaser of a mortgaged estate agreed with the vendor to pay the mortgage debt, and a further sum to the

direction that the mortgages should be discharged from the personal estate, so that the devisees might hold the estates,

---

vendor, but there was no communication with the mortgagee. The authority of Tweddell *v.* Tweddell was recognized, to show that the debt was primarily chargeable upon the land, and did not become the debt of the purchaser, as a personal liability. Lord Alvanley collected from the decisions that the purchaser of land, charged with a debt, by a mere covenant to indemnify the vendor, does not make the debt his own, except in respect to the estate; and the estate, and not his personal property must bear it. The purchaser might be circuitously liable to the vendor for his indemnity, but in such case the decree would have been for a sale of the land.

In the case of Waring *v.* Ward, (5 Ves. 670; 7, 332,) the purchaser of an estate mortgaged borrowed a further sum, for which he gave a new bond and mortgage. After his decease, held, the debt should be paid from the personal estate, because the personal contract was primary, and the real contract only secondary. Lord Eldon, in giving judgment, remarked, that in general the personal estate was primarily liable, because the contract was primarily a personal one, and the land bound only *in aid* of the personal obligation; that Lord Thurlow carried the doctrine so far as to hold, that if the purchaser of an equity of redemption covenants to pay the mortgage debt, and also to raise the interest from four to five per cent., yet, as between his real and personal representatives, even the additional interest is not primarily a charge upon the personal estate, being incident to the charge; that, even without any express covenant, the purchaser of an equity is bound to indemnify the vendor against any personal obligation, and pay a debt charged upon the land; that the case of Tweddell *v.* Tweddell proceeded upon the ground, that the debt due the mortgagee was never a debt *directly* from the purchaser; and that, if Lord Thurlow was right upon the fact, the case was a clear authority, that the purchase of an equity will not make the mortgage debt the debt of the purchaser, and in his hands it is the debt of *the estate*, and a mortgage interest, as between his representatives.

In the case of The Earl of Oxford *v.* Lady Rodney, (14 Ves. 417,) the testator purchased an estate subject to mortgage, paid the surplus of the price to the vendor, and then covenanted with the mortgagee to pay him the mortgage debt. After his death, upon the question whether the personal estate should go to pay the debt, Sir William Grant, Master of the Rolls, remarked, that it was not very easy to reconcile the case of Tweddell *v.* Tweddell with the decision of Lord Hardwicke, in Parsons *v.* Freeman, that where the mortgage-money is taken as part of the price, the charge becomes a debt from the purchaser. But he admits the correctness of Lord Thurlow's principle, where the contract of the purchaser gives the mortgagee no

freed therefrom; and the personal assets proved deficient for payment of the mortgage and other debts; a decree was

direct and immediate right against himself, but is a mere contract of indemnity. (Upon these observations Chancellor Kent remarks, (3 Johns. Cha. 260, 261,) that the mortgage debt is always *part of the price*, unless the vendor agrees to remove the incumbrance. By his covenant of indemnity, the purchaser takes the land *cum onere*, and the value of the incumbrance is of course deducted from the value of the land.)

From this series of cases Chancellor Kent deduces the general principle, that a covenant by the purchaser of an equity of redemption, to indemnify the vendor against the mortgage, does not make the debt his own, so as to charge it primarily upon his personal assets. To have this effect, there must be a *direct* communication and contract with the mortgagee, and some decided evidence of an intent primarily to charge the personal estate; as where the original contract is essentially changed, and lost or merged in the new and distinct engagement with the mortgagee; and the party shows, that he meant to assume the debt, absolutely and at all events, as his own personal liability. 3 Johns. Cha. 261, 262.

The following are the most recent English cases upon the subject under consideration.

A testator, by his marriage settlement, after reciting that he was seised in fee of certain estates, subject to mortgage debts, the amount of which was mentioned, and which he had contracted, settled the estates, subject expressly to the debts, on himself for life, remainder to secure a jointure for the wife, remainder to the first and other sons of the marriage in tail male, remainder to himself in fee, and covenanted for the title, excepting the debts; and he reserved to himself the power of raising £10,000 by mortgage, to be made redeemable by the person for the time being entitled to the freehold or inheritance. The testator exercised the power, reserving the equity of redemption to himself, his heirs, executors, &c., or the person for the time being entitled, as aforesaid, and covenanted to pay the mortgage debt. He then died without issue, having by his will charged his real and personal estate with his debts, and bequeathed the residue of his personal estate after payment of his debts, and devised his remainder in fee expectant on the failure of his issue male to his brother and his brother's sons in strict settlement. Held, they were not entitled to have his personal estate applied to exonerate the devised estates from any of the mortgage debts. Ibbetson *v.* Ibbetson, 12 Sim. 206. Shadwell, V. C., says (Ibid. 216, 217): — "The difficulty in this case is, that if you claim the benefit of the common rule, then you will have the personal estate of the settlor applied to exonerate the whole inheritance; and therefore it will be applied contrary to the intention

made, that the mortgage and other specialty debts should first be paid from the personal assets *pro ratâ*, that the resi-

---

of the settlor. For his widow is still alive, and therefore the effect will be to exonerate the settled estates in her favor. As the settlement was made so as to manifest an intention, on the part of the settlor, that the whole inheritance should bear the mortgages, I think that that intention, having been once plainly manifested, must be considered as existing until it is shown to have been altered. And as there is nothing in this case which shows that that intention was ever changed, my opinion is that the common rule does not apply."

A testator gave to his wife certain specific articles of personal property, and certain portions of real estate free from the mortgages thereon, and the benefit of certain contracts for the purchase of other lands. He devised the rest of his real estates, in trust to the devisee to sell, and from the proceeds pay, first, his funeral and testamentary expenses, his debts due on the mortgages of the estates devised to his wife, the sums due on the contracts, and all his other debts; and in the next place, he directed certain sums to be paid from the proceeds to different persons, and gave the residue to another legatee, and appointed his wife sole executrix. Held, the personal estate was exonerated from the debts. Blount *v.* Hipkins, 7 Sim. 43.

A testator, having mortgaged an estate for £4,460, devised it in fee, the devisee "paying the mortgage thereon;" and devised his residuary real and personal estates to trustees for payment of debts, and gave to the mortgagee, through his executors, £2,000 to exonerate the estate. Held, if he had simply devised "the estate," or "the estate subject to the mortgage thereon," the mortgage would have been payable from his general estate. But the words, "he paying," &c., imposed a duty on the devisee, and constituted a direction or condition that he should pay the mortgage, or take the estate subject to the mortgage, over and above the £2,000. Lockhart *v.* Hardy, 9 Beav. 379.

A mortgagee made a sub-mortgage of the estate, and then devised it, and bequeathed to the sub-mortgagee, through his executors, a certain sum, to clear the estate in part. After his death, the sub-mortgagee foreclosed. Held, the devisee was entitled to the sum bequeathed. Ibid.

"If an estate descend to the heir, subject to a mortgage, and he become a party to an assignment of the mortgage, and, by bond or covenant, contract with the assignee to pay the amount due, he does not thereby make it his personal debt, as between his heir and executor. As between those parties, the mortgaged estate remains the primary fund for the payment of the mortgage debt; and the bond or covenant of the heir of the mortgagor is considered merely as an auxiliary security to the assignee." Per Leach, M. R., Barham *v.* Thanet, 3 My. & K. 622.

due of the mortgage debts should be borne by the respective estates to which they belonged, and the deficiency of the other specialty debts and the simple contract debts, by the several devised estates and the specific legacies, *pro ratâ*.[1]

11. In general, on a deficiency of other assets for payment of mortgage debts, each devisee takes his estate *cum onere*. But where different mortgaged estates form part of a general mass of property, which is devised charged with debts, these estates, on failure of other assets, shall contribute, in proportion to their respective values, to pay off the mortgages, as well as the other remaining debts.[2]

12. A mortgagor, by his will, ordered payment of his debts, and devised his residuary lands, including the land mortgaged and all his residuary personal property, to his oldest son, who was the executor. The son dies intestate, the mortgage not being paid. The father and son leave sufficient personal property to pay the mortgage. Held, as between the heir and administrator of the son, the mortgaged estate was the primary fund for payment.[3]

13. Personal estate will not be primarily applied to the prejudice of legatees, except residuary legatees, or of creditors. So the paraphernalia of the widow are exempted.[4]

14. A specific devisee of mortgaged estate shall have the estate exonerated from the debt, as against a residuary legatee, though such estate, and the residue, are both given freed from debt; if the fund provided by will for the payment of debts proves insufficient.[5]

[1] Symons *v.* James, 2 Y. & Coll. (N. S.) 301.
[2] Coote, 548.
[3] Clarendon *v.* Barham, 1 Y. & Coll. 688.
[4] Coote, 540.
[5] Brooke *v.* Warwick, 1 Hall & Tw. 142.

CHAPTER XV.

EQUITY OF REDEMPTION.

1. Definition and nature of an equity of redemption.
3. Distinction between an equity of redemption and a *trust*.
12. Who may redeem a mortgage.
21. Against whom redemption may be claimed.
24. Redemption in case of the death of the mortgagor.
27. Redemption by a party having a partial interest in the property; claim for reimbursement.
29. An equity of redemption is *assets*.
30. And liable to legal process.
33. But it is not thus liable, in a suit upon the mortgage debt; cases and distinctions upon this subject.
48. Whether the indorsee of a mortgage note may levy upon the equity of redemption.
51. *Curtesy* in an equity of redemption.
52. Whether subject to *dower*: English and American law upon this subject.
83. On what terms the widow may redeem.

1. In the previous chapters, treating of the respective estates of mortgagor and mortgagee, it has of course been found necessary to explain the nature of that title which the law denominates an *equity of redemption*. We propose now, however, to consider the subject in more minute detail, and distinctly point out the qualities, rights, and obligations incident to this somewhat anomalous interest in real property.

2. It is said,[1] an equity of redemption can be more appropriately illustrated than defined or described. While some learned judges have called it, in the eye of a court of equity, *the fee-simple* of the land, others have spoken of it as *nothing at all in the eye of the law*.[2] (*a*)

[1] 1 Pow. 250 *b*, n. A.
[2] See Burgess *v.* Wheate, 1 W. Bl. 145; Preston *v.* Christmas, 2 Wils. 86.

(*a*) It is said, an equity is an estate or interest in the land, reserved or retained by the tenant. Viscount, &c. *v.* Morris, 3 Hare, 407.

So, in an earlier case, that an equity is *an estate*: it may be devised, granted, or entailed with remainders, which may be barred by fine and recovery; not a mere right. It is a seisin; the mortgagor is owner — the

3. An equity of redemption, being, as the name imports, an estate fully recognized only by Courts of Equity, has of course many qualities in common with *a trust*, which is also peculiarly a subject of the same jurisdiction. The mortgagee is called a trustee for the mortgagor, subject to the security.[1] So it has been said,[2] that a mortgagee, after receiving his debt, is considered as a trustee of the estate for the mortgagor till a reconveyance. So a mortgage and a conveyance in trust *by way of security* are said to be alike in this respect, and in being redeemable at any time before sale, but not after.[3] The following points of distinction have been suggested between these respective titles.

4. An equity of redemption is a *title in equity*, not merely a *trust;*[4] although, as is said, this title cannot be asserted except by *subpœna*.[5]

5. A deed of trust in the nature of a mortgage is condi-

[1] Silvester *v.* Jarman, 10 Price, 84. See Coates *v.* Woodworth, 13 Ill. 654; King *v.* The Merchants, &c., 1 Seld. 547; Charles *v.* Clagett, 3 Md. 82; Chowning *v.* Cox, 1 Rand. 306; Morgan *v.* Morgan, 10 Geo. 297; Bloomer *v.* Van Rensselaer, 15 Ill. 503; Smith *v.* Otley, 26 Miss. 291; Briggs *v.* Davis, 20 N. Y. 15. As to the respective rights and duties of the parties, growing out of *a mortgage* and *conveyance in trust* of the same land, see Little *v.* Brown, 2 Leigh, 353; Bell *v.* Hammond, Ibid. 416. See also Ch. 1, § 37; Ch. 2, § 7, and seq.

[2] Reading of Judge Trowbridge, 8 Mass. 411.

[3] Hogan *v.* Lepretre, 1 Port. 392.

[4] 1 Sand. Uses, 203; 1 Ed. 206. See Dobson *v.* Land, 14 Jur. 288.

[5] Viscount, &c. *v.* Morris, 3 Hare, 402.

---

mortgage personal estate, which will not pass by a devise of lands, tenements, and hereditaments. Casborne *v.* Scarfe, 1 Atk. 605, 606; Paulling *v.* Barron, 32 Ala. 9; Buchanan *v.* Munroe, 22 Tex. 537; Barelli *v.* Schymanski, 14 La. Ann. 47. "A well-defined interest on land, having many of the attributes of general ownership." Per Denio, J., Pell *v.* Ulman, 4 Smith, 145. See Briggs *v.* Davis, 20 N. Y. 15. It descends to the heir. Asay *v.* Hoover, 5 Barr, 21. In Ellithorp *v.* Dewing, (1 Chipm. 143,) it was held, that a release of the equity of redemption by mortgagor to mortgagee, made while a third person was in possession, claiming adversely to both, was not within the act to prevent fraudulent speculations and sales of choses in action. So an assignment by the mortgagor of his interest is not *champerty*, though the mortgagee be in possession. Borst *v.* Boyd, 3 Sandf. Ch. 501. But see King *v.* The State, &c., 7 Cush. 7.

tional and defeasible. An absolute deed of trust is for the trust purposes unconditional and indefeasible.[1]

6. A mortgage does not *per se* create a trust, more especially before condition broken. It conveys the estate subject to a condition. It is founded on *contract*. The mortgagee is not accountable to any one, until he enters, takes possession, and receives the rents and profits; in which case he may, in some sense, be considered as trustee, for he is to render an account; but this must be done in the manner and for the purposes provided in the several statutes for redeeming mortgages, and he is not trustee in any other light. Hence, under the statute giving equity jurisdiction of trusts to the Supreme Court in Massachusetts, the assignee of a mortgagor cannot maintain a bill for injunction against the mortgagee, who is proceeding to recover possession at law; and for a decree, that the mortgage be cancelled.[2] So a mortgagee, notwithstanding his relation to the mortgagor, may buy the land, under a mortgage sale, at a low price,[3] which a trustee would not be permitted to do. The principles applicable to dealings between trustees and *cestuis que trust*, that such dealings are not prohibited, but are watched by the Court with great jealousy, and that the burden is on the trustee to show that they were fair and reasonable, do not apply to the case of mortgagor and mortgagee. Dependence, and the duty of protection, are not involved in their relation; though it is a circumstance which always creates suspicion.[4]

7. In regard to the distinction between a mortgage and a trust already referred to, that a mortgagee may enforce his right by adverse suit, *in invitum*, against the mortgagor, it is further said, that a trustee cannot claim against the *cestui*, because these parties have always an identity and unity of interest, and are never opposed in contest to each other. In

[1] Hoffman *v.* Mackall, 5 Ohio, (N. S.) 124.

[2] Hunt *v.* Maynard, 6 Pick. 489 See Hammonds *v.* Hopkins, 3 Yerg. 528; Clarke *v.* Sibley, 13 Met. 213; Putnam *v.* Putnam, 4 Pick. 139; Eastman *v.* Foster, 8 Met. 19; King *v.* The State, &c., 7 Cush. 7, 8, 15.

[3] Mott *v.* Walkley, 3 Edw. 590.

[4] Chapman *v.* Mull, 7 Ired. Eq. 292.

general, a trustee is not allowed to deprive his *cestui que trust* of the possession; but chancery never interposes to prevent the mortgagee from taking possession; and, when he obtains possession, he acts, not as a trustee, but independently and adversely, for his own use and benefit. Equity stops a trustee from dispossessing his *cestui*, because it would be a breach of trust, whereas, in the case of a mortgagee, this proceeding is in strict conformity to his contract, and any impediment to it would be a direct violation of such contract. So also chancery does not impede, but assist, the mortgagee, in obtaining an absolute title by foreclosure.[1]

8. In the case of Pawlett *v.* The Attorney-General,[2] Hale, Chief Baron, said: — "There is a diversity betwixt a trust and a power of redemption, for a trust is created by the contract of the party, and he may direct it as he pleaseth; and he may provide for the execution of it, and therefore one that comes in in the *post* shall not be liable to it without express mention made by the party. But a power of redemption is an equitable right inherent in the land, and binds all persons in the *post* or otherwise. Because it is an ancient right, which the party is entitled to in equity. And although by the escheat the tenure is extinguished, that will be nothing to the purpose, because the party may be recompensed for that by the Court, by a decree for rent, or by part of the land itself, or some other satisfaction. And it is of such consideration in the eye of the law, that the law takes notice of it, and makes it assignable and devisable."

9. So, it is said, the relation of mortgagor and mortgagee stands upon grounds peculiar to itself. It is not the case of an ordinary express trust, nor to be governed by the same rules. The mortgagee has a right to the possession of the property. He holds it for himself from the first, and not for the mortgagor. The mortgagor's right to redeem does not depend upon the mortgagee's possession. He may file his

[1] 2 Story's Eq. 278, n. 3.

[2] Hardres, 469; Tucker *v.* Thurstan, 17 Ves. 133; Benzein *v.* Lenoir, 1 Dev. Ch. 225; —— *v.* Bennett, Ib. 444.

bill to redeem, as well if he have possession of the property himself, as if the mortgagee possess it.[1]

10. Conformably to the principles above stated, a conveyance in trust to pay debts, and to sell the premises, if necessary, to pay the debts, and, after the debts are paid, in trust for one of the grantors, is not a mortgage, and, it seems, need not be registered, as against a subsequent assignment of the grantors, under the bankrupt law.[2] And, on the other hand, under the laws of Georgia, a mortgage is not a conveyance in trust, but an incumbrance created to pay a debt; neither is it an assignment, conveyance, or transfer, under the act of 1818, nor does it come within the provisions of that act.[3] So a conveyance, in trust that the estate stand chargeable with a certain sum and interest, and subject thereto in trust for a third person, with a power of sale by the purchaser upon non-payment after notice, was held not to be a mortgage, upon which a bill for foreclosure could be maintained, though the Court would aid in effecting a sale of the property.[4]

11. But a covenant, signed by both parties to a deed, at the same time with the deed, and reciting "an understanding and agreement that the grantee should, as soon as possible, sell the land for the best possible price, retain a sum due to him from the grantor, and pay him the residue," constitutes, with the deed, a conveyance in trust, in the nature of a mortgage.[5] (*b*) And if the grantee violate his covenant to sell the

[1] Per Green, J., Wood *v.* Jones, Meigs, 517.
[2] McMenomy *v.* Murray, 3 Johns. Ch. 435.
[3] Seals *v.* Cashin, 2 Geo. Decis. 76.
[4] Sampson *v.* Pattison, 1 Hare, 533.
[5] Ogden *v.* Grant, 6 Dana, 473.

(*b*) On the other hand, one *receiving* property in trust may bind himself to account for it by an informal mortgage. A. received property of B., to invest it for B.'s benefit, and gave him a paper, not in form a mortgage, acknowledging such receipt, and stating that certain property of his was mortgaged to secure B. Upon the death of A., insolvent, held, a mortgage. Mennude *v.* Delaire, 2 Desaus. 564.

land, the grantor may recover the actual damages by a suit on the covenant, or compel performance by a bill in equity; but cannot elect to recover the value of the land, deducting the debt, thus converting a conditional into an absolute conveyance.[1] (*c*)

[1] Ogden *v.* Grant, 6 Dana, 473.

(*c*) It is the right and duty of a trustee in insolvency to sell the mortgaged property of the insolvent, and pay off the liens and incumbrances thereon; though the transfer made to secure a debt is in the nature of a trust. Bank, &c. *v.* Whyte, 1 Md. Ch. 536.

Deed to A., to be held to his own use until he should be paid a certain sum, advanced by him for B., the purchaser, after which he was to stand seised to the use of B., as if the title had been made directly to B. A. brought ejectment against B., to compel payment of the moneys advanced, and judgment was confessed, to be released on payment of a certain sum in a certain time. For non-payment, A. took possession, and B. brought ejectment. Held, A. had the right to take possession, and hold until reimbursed, and not as absolute owner; that the deed to A. was not properly a mortgage, but a deed of trust, in which the *cestui que trust* had the same right which a mortgagor has against a mortgagee; that A. was liable to account for the profits, towards the debt; that it was not necessary for B. to tender the debt in money to A. before bringing his suit; that B. was entitled to recover, if the clear profits of the land, since it came into A.'s possession, equalled the judgment and interest; if those profits amounted to so much before suit brought, B. could recover unconditionally; but if not to so much until after, he could recover, on condition that he pay all the costs of the suit before taking out execution. Hewitt *v.* Huling, 11 Penn. 27.

The owners of several estates, being jointly interested in the water-power connected therewith, formed a company, and entered into an agreement, by indenture, in which each covenanted, for himself and his personal representatives or assigns, with the others and their respective personal representatives or assigns, and his and their respective estates, for the faithful performance of the conditions and provisions of said indenture, "meaning and intending to create a lien upon and to bind" their said estates, so far as "they might in law or equity do the same, and" their "several heirs, executors, administrators, or assigns, so far as said estates were concerned, and to the extent thereof, and no further, as fully and absolutely and as far as" they might "do the same, either in law or equity, for the faithful discharge and fulfilment of all the liabilities of said company, and of the requirements and

12. With regard to the *parties*, who are allowed to redeem a mortgage; in general, any one may do it who is entitled to the legal estate of the mortgagor, or claims a subsisting interest or lien under him. Lord Eldon remarked,[1] that a mortgagee shall hold the land against all persons, who fail to show *a clear right* of redeeming. It is said, persons entitled to redeem in equity are those, who within the time limited in the mortgage would have been entitled to redeem at law.[2] So also, that by agreement a right to redeem may be reserved *to a stranger*.[3]

13. It is held that the grantee of a mortgagor may file a bill to redeem and have the mortgage satisfied, though a part of the mortgage debt has become due to other parties. And where a party acquires a claim to rents and profits, subsequently to a decree for the sale of property, in favor of one who has become entitled to part of the money due on the mortgage, he may set up such claim in a bill to redeem.[4]

14. Judge Story says: — "The equity of redemption is not only a subsisting estate and interest in the land, in the hands of the heirs, devisees, assignees, and representatives (strictly so called) of the mortgagor; but it is also in the hands of any other persons, who have acquired any interest in the

[1] James *v.* Biou, 3 Swanst. 237; Purvis *v.* Brown, 4 Ired. Eq. 413; Boarman *v.* Catlett, 13 Sm. & M. 149; Scott *v.* Henry, 8 Eng. 112.

[2] Skeffington *v.* Whitehurst, 3 Y. & Coll. 2.

[3] Purvis *v.* Brown, 4 Ired. Eq. 413.

[4] McConnel *v.* Holobush, 11 Illin. 61.

provisions of said indenture." The plaintiff, a party to the indenture, having afterwards incurred expense, under its provisions, for the purpose of increasing the water-power, in which all the parties to the indenture were jointly interested, brings a bill in equity against third persons, to whom some of the parties had conveyed their estates, praying that they might be held to pay him their shares and proportions of the expense, and for general relief. Held, the indenture was not a legal mortgage, but only an equitable mortgage; that, if it created any lien, implying a trust, it was a trust *sui generis*, in the nature of an equitable mortgage, of which the Court had no jurisdiction; and the bill was dismissed. Clarke *v.* Sibley, 13 Met. 210.

lands mortgaged, by operation of law or otherwise, in privity of title. Such persons have a clear right to disengage the property from all incumbrances, in order to make their own claims beneficial or available. Hence, a tenant for life, a tenant by the curtesy, a jointress, a tenant in dower in some cases, a reversioner, a remainder-man, a judgment creditor, though an execution has not issued, nor the land been sold, (*d*) a tenant by *elegit*, and indeed every other person, being an incumbrancer, or having a legal or equitable title or lien therein, may insist upon the redemption of the mortgage, in order to the due enforcement of their claims and interests respectively in the land. When any such person does so redeem, he or she becomes substituted to the rights and interests of the original mortgagee in the land, exactly as in the civil law. And in some cases (as we have already seen) a further right of priority by tacking may sometimes be acquired beyond what the civil law allowed. Hence it is, that a mere annuitant of the mortgagor, (who has no interest in the land,) has no title to redeem."[1] So an unsealed contract gives no right to redeem.[2] But even a person claiming under a prior or subsequent voluntary conveyance may, as against the mortgagee, redeem.[3]

15. The assignee of a bankrupt may redeem. Even a *prowling* assignee, who purchases an equity which has been abandoned fifteen years, for a trifling sum.[4] So a tenant for years.[5] Thus, where one co-tenant conveys a parcel of the

[1] 2 Story's Eq. § 1023; Upham *v.* Brooks, 2 W. & M. 407; Brainerd *v.* Cooper, 10 N. Y. (6 Seld.) 356.
[2] Porter *v.* Read, 1 Appl. 363.
[3] 2 Story's Eq. § 1023, n.
[4] 1 Pow. 262, *a*, 263, *a*.
[5] 1 Pow. 162, *b.*; Rand *v.* Cartwright, 1 Ch. Cas. 59; Loud *v.* Lane, 8 Met. 517; Bacon *v.* Bowdoin, 22 Pick. 401.

(*d*) Kent *v.* Laffan, 2 Cal. 595. By filing a bill against mortgagee and mortgagor. Hitt *v.* Holliday, 2 Litt. 334. A creditor, until he has recovered judgment for his debt, cannot come into chancery for the *foreclosure* of mortgages. Warner *v.* Everett, 7 B. Mon. 262. Nor can a bond creditor redeem, till he recovers a judgment. 1 Pow. 263, n. The judgment creditor of a deceased mortgagor cannot redeem, till after *plene admin.* has been pleaded, and judgment rendered against the heir upon *sc. fac.* Elliot *v.* Patton, 4 Yerg. 10.

land by metes and bounds, takes back a mortgage, and assigns it, a lessee for years from the mortgagor may redeem the mortgage from the assignee, if he has no title under the other co-tenant.[1] So an assignee of a term for years in a part of the land mortgaged may redeem the whole, and claim an assignment of the mortgage, and, if it is recorded, an acknowledgment of such assignment.[2] So, it seems, the holder of an easement may redeem. In New Hampshire, an attaching creditor.[3] (*e*) So the purchaser under a sale upon a second mortgage may redeem the first.[4] So one in possession under a parol contract to convey, if entitled to specific performance, except as against *bonâ fide* purchasers without notice.[5]

16. It has been held, that one having an equitable lien may redeem; as, for instance, a widow, claiming a settlement for life under marriage articles.[6]

17. It is, however, the general rule of law, that the person having a legal title to the estate is the party authorized to redeem. Hence a *cestui que trust* is not the proper plaintiff in a bill for redemption, unless some special cause be shown for not bringing the suit in the name of the trustee.

18. Upon this subject Judge Story remarks as follows: — "The trustees under the will were invested with the legal estate, and consequently they are the proper parties to file a bill to redeem. It does not appear from the bill, that the plaintiffs are really entitled to anything under the will; for it is not alleged that anything would or did remain after satisfying the prior trust. If it did, still the trustees, being owners of the legal estate, are solely entitled to redeem, un-

[1] Bacon *v.* Bowdoin, 2 Met. 591.
[2] Averill *v.* Taylor, 4 Seld. 44.
[3] N. H. St. 1845, 233.
[4] Fannell *v.* Murphy, 2 Wis. 533.
[5] Lowrey *v.* Tew, 3 Barb. Ch. 407. See § 20.
[6] Haymer *v.* Haymer, 2 Ventr. 343.

(*e*) But a creditor who has foreclosed a mortgage, and obtained a decree for sale, does not thereby become a judgment creditor, and entitled to redeem from the purchaser, under the Alabama statute of 1842. Branch Bank, &c. *v.* Furness, 12 Alab. 367.

less they have refused to redeem, or have colluded with the mortgagee, or some other impediment is shown to the redemption on their part. The bill ought to have contained specific allegations on this head, stating a case, which would establish a residuary interest in the plaintiffs, and a ground for their claim to redeem, instead of the trustees. The trustees are made parties, and have answered, and there is a general charge of confederacy against them. But this will not supply the defect of proper allegations to establish the plaintiff's claim to redeem. The trustees must be called upon to answer, and must answer specifically to such matters, as will justify the Court in acting without or adversely to them." [1]

19. The lord of a manor, taking by *escheat*, on the death of a tenant without heirs, the fee-simple of lands holden of the manor, but subject to a demise by way of mortgage for a term of years created by the tenant, is entitled in equity, as against the mortgagee, to redeem the term.[2]

20. A mere *personal claim*, which gives no actual, vested title to the land, will not be sufficient ground for redeeming a mortgage, although the party may be greatly interested in having it discharged. Thus the obligee, in a bond to convey a mortgaged estate, has no right to redeem.[3] (*Supra*, 15.) In White *v.* Parnther,[4] Lord Wynford remarked, with reference to the claim of an *annuitant* to redeem the mortgage: — "If so, every legatee of the mortgagor must have the same right of insisting that the mortgage debt is satisfied, and of calling on the mortgagee to give him an account of the proceeds of the estate from the time of the death of the mortgagor, a period of above fifty years. If creditors or legatees of the mortgagor had the right of calling mortgagees to separate accounts, every mortgagee would be liable to be ruined, by the different suits that might be instituted against him. But from the principle laid down in the case of Troughton *v.* Binkes, (6 Ves. 572,) and the cases

[1] Per Story, J., Dexter *v.* Arnold, 1 Sumn. 111, 112.

[2] Viscount, &c. *v.* Morris, 3 Hare, 394.

[3] M'Dougald *v.* Capron, 7 Gray, 278.

[4] 1 Knapp, 229.

referred to by the Master of the Rolls in his judgment in that case, I think that the mortgagor or his heirs only can sue the mortgagee for an account and redemption, unless it can be shown, that they and the mortgagee are in collusion, to prevent creditors or legatees from recovering what is due to them from the mortgagor's property." So, in Grant *v.* Duane,[1] Thompson, J., says: — "If the respondents have shown no interest in themselves, or a right to redeem the mortgage on their own account, or on account of others, with whom some connection is shown, and whose interest they have a right to represent, their claim cannot be supported, notwithstanding some other person might have a right to enforce the same claim. It cannot be allowed to them to speculate on the claims of others, and redeem at their peril, and then litigate with those who may have the right. No person can come into a Court of Equity for a redemption of a mortgage, but but he who is entitled to the legal estate of the mortgagor, or claims a subsisting interest under him." So one having a deed from the mortgagor subsequent to the original mortgage, assisting in the entry of the mortgagee, and the conveyance by him, without giving notice of his claim, and who has neither paid nor tendered anything to the mortgagee or his assignee, is not entitled to redeem, or have a release of the premises, after foreclosure, by paying the amount mentioned in the assignee's personal contract with the mortgagor.[2]

21. While all parties interested in the land are thus protected in the right of redemption, it is also strictly enforced *against* all who, by whatever title, succeed to the rights of the mortgagee. Thus, in England, *the king* is not privileged from this claim.

22. The case of Pawlett *v.* The Attorney-General[3] was a bill to redeem a mortgage. The plaintiff mortgaged to Ludlow, and entered into a statute and recognizance to perform

[1] 9 Johns. 611.
[2] Shapley *v.* Rangeley, 1 W. & M. 213.
[3] Hard. 465.

the covenants of the mortgage and pay the debt at a certain day, which was past. The mortgagee died, having demised all his goods, debts, and personal estate to his executor. The son and heir of the mortgagee having been attainted of high-treason, the king seizes, and the executor extends the plaintiff's lands upon the recognizance, who thereupon exhibits his bill against the king and the executor, suggesting that he was prevented by the plague from paying at the time and place appointed, and that afterwards the mortgagee accepted the interest and waived the forfeiture. The question was, upon demurrer to the bill whether redemption should be allowed against the king. Hale, Chief Baron, said:[1] — "This is a case of great concern, and deserves great consideration. It was made a question in this present Parliament in the House of Lords in the Earl of Cleveland's case; first, whether or no there be a right of redemption in this case against the king; and secondly, if there be, what remedy must be taken. And answered, as I take the law to be, that in natural justice redemption of a mortgage lies against the king. But I am of opinion that the king cannot be compelled to reconvey; but that an *amoveas manum* only lies in such case. The matter of redemption, it seems, is not the main business in the case; for Mr. Attorney-General offers to give way to a redemption, upon payment of the money. But the point is, who shall have the money, whether the executor and devisee, or the king." The report does not show any definite decision of this question. The Chief Baron afterwards remarks: — "The statute of 33 Hen. 8, c. 39, is to be considered, which gives relief in equity against the king. And I conceive clearly, that in this case, the executor would be relieved against the heir for the money; because in common estimation it is but a personal estate." "Baron Atkyns was strongly of opinion, that the party ought in this case to be relieved against the king, because the king is the fountain and head of justice and equity, and it shall not be presumed, that he will be defec-

[1] Hard. 467.

tive in either. And it would derogate from the king's honor to imagine, that what is equity against a common person should not be equity against him."[1] (*f*)

23. The question, who has the right of redemption, often becomes important after the death of the mortgagor.

24. In general, in case of the mortgagor's death, his heir or assignee alone can redeem.[2] (*g*)

25. Where redemption is sought by the heirs of the mortgagor, Judge Story remarks as follows, with regard to the proper form of proceeding: — "In general, it is certainly proper that all the heirs of the mortgagor should be before the Court, before a redemption is decreed. And this for two reasons: first, that their rights and interests may not be affected by any change of the title without their consent;

[1] Hard. 469.
[2] Smith *v.* Manning, 9 Mass. 422; Elliot *v.* Patton, 4 Yerg. 10; Shaw *v.* Hoadley, 8 Blackf. 165.

(*f*) In the case of Viscount, &c. *v.* Morris, 3 Hare, 394, it was contended, that opinions had been expressed in the case of Burgess *v.* Wheate, 1 Ed. 205, 206, adverse to these views of Lord Hale. But Vice-Chancellor Wigram says, (3 Hare, 405): — "I do not understand any of the judges in Burgess *v.* Wheate to have expressed an opinion adverse to what Lord Hale says, in the case in Hardres, as to the nature of an equity of redemption. In that part of Sir Thomas Clarke's judgment in which he distinguishes Sand's case from Pawlett *v.* The Attorney-General, as well as in a subsequent part of the judgment, he appears to me to approve of Lord Hale's distinction, and to say that Lord Nottingham approved of it also. Lord Mansfield certainly approved of what Lord Hale said in Pawlett's case; and the Lord Keeper although he said he believed that what Lord Hale laid down, and Baron Atkyns approved, in Pawlett's case, had never been decided, remarked that he hoped the law was so settled."

(*g*) In Georgia, a rule for foreclosure, after the death of the mortgagor, must be made upon the executor or administrator, not the heirs. Magruder *v.* Offut, Dudl. 227. In Arkansas, the Court may order the executor to redeem. Ark. L. 139. Upon a decree of foreclosure against heirs, the surplus proceeds of sale go to them. Shaw *v.* Hoadley, 8 Blackf. 165. In a suit to redeem against a devisee, an account of the rents received by the devisor may be obtained, without his being represented on the record. Trulock *v.* Robey, 15 Sim. 277.

and secondly, that they may be parties to the account, and the mortgagee or his heirs and representatives not be harassed by a new suit for a new account."[1]

26. In Wells *v.* Morse,[2] it was objected to a bill in equity for redemption brought by an heir, that the *creditors* of the mortgagor (the estate being insolvent) were the proper parties to redeem. The Court say: — "The estate descended, doubtless, subject to the lien of the administrator in behalf of creditors. But if the right of the creditors has never been asserted, although more than twenty years have elapsed, it cannot now be asserted, in this collateral way, to bar the heir. Whether that right will ever be asserted, and if so, whether their claims are not barred by lapse of time, are questions proper to be decided, when they shall be duly presented. We do not deem it necessary to determine what their rights may be, because we do not see how their rights are to be affected by this proceeding. They can have no claim for anything more than the value of the equity of redemption, and if a redemption is allowed in this case, they may pursue their equity in the hands of the heir. This Court will keep the mortgage on foot, if necessary for the purposes of justice, although the interest of the mortgagee and the equity of redemption unite in the same person. There will be no difficulty in treating the plaintiff as mortgagee, and the creditors as entitled to the right of redemption, should the case hereafter require it."

27. In general, one interested cannot redeem a mortgage, without paying *the whole debt.* "The mortgagor or his assignee must pay the whole liability charged upon the mortgage before he will be allowed to redeem, unless he can show that equity requires the other party to abate some portion thereof by reason of his liability to contribute to the payment of the same."[3] And the *whole property* must be redeemed.[4] If the party redeeming has only a partial in-

[1] Dexter *v.* Arnold, 1 Sumn. 112, 113.
[2] 11 Verm. 17.
[3] Per Dewey, J., Crafts *v.* Crafts, 13 Gray, 363.
[4] Boqut *v.* Coburn, 27 Barb. 233.

terest in the property, which might be defeated by the mortgage, he will, at least in equity, stand in place of the party, whose interest in the estate he discharges, and will hold it till the others interested with him pay their shares of the debt, according to the proportional value of the respective portions.[1] And he may claim an assignment of the mortgage.[2] Thus this rule applies to a purchaser of a portion of the mortgaged property.[3] So also, to all who are in any way interested in the equity of redemption, as owners of distinct parcels of the land, or as tenants in common.[4] (*h*) So, even where the party paying the mortgage has taken a formal discharge of it.[5] And the mortgagor cannot claim to have a part of the land estimated for the purpose of payment, and thereby entitle himself to redeem the rest by paying the balance of the debt.[6]

28. So the whole debt must be paid, though the whole or a part of it has been separated from the mortgage, and is owned by a different person.[7] But if a mortgaged estate is severed, and a part of it comes to an assignee of the mortgage, the holder of the other part may redeem by paying a proportional part of the debt. So where, a part of a mortgaged estate having been improved by the erection of a mill and its appurtenances, the estate was subsequently conveyed to different purchasers; the improved part passing to A., and the other part to B., who was also the assignee of the mortgage: held, the amount to be paid by A., in order to redeem

[1] 1 Pow. 281, a. n.; Elwys *v.* Thompson, 9 Mod. 396; Roswell *v.* Simonton, 2 Cart. 516; Mullanphy *v.* Simpson, 4 Mis. 319.

[2] Averill *v.* Taylor, 4 Seld. 44.

[3] Smith *v.* Kelley, 27 Maine, 237.

[4] Hubbard *v.* Ascutney, &c. 20 Verm. 402. See Brown *v.* Worcester, &c. 8 Met. 47.

[5] Towle *v.* Hoit, 14 N. H. 61.

[6] Spring *v.* Haines, 8 Shepl. 126.

[7] Johnson *v.* Candage, 31 Maine, 28.

(*h*) It is said, that where one person pays the debt, but another cannot in equity take the land from him without repayment; the debt still subsists, for the purpose of upholding the mortgage. Robinson *v.* Leavitt, 7 N. H. 97. On the other hand it is said, one mortgagor cannot redeem and take a conveyance of the land, without consent of the other. Porter *v.* Clements, 3 Pike, 364; Mullanphy *v.* Simpson, 4 Mis. 319.

his part, must be apportioned according to the improved value.[1] And the rule in question will not necessarily operate to debar a party from redeeming a part of the land, because the right of redeeming another part has been lost. In Dexter *v.* Arnold,[2] Judge Story says: — "It may be suggested that there cannot be any redemption of a mortgage, unless of all the premises contained in the original mortgage deed; and therefore if there be a bar to any part, that operates as a bar to the whole. Our opinion is, that this objection is not maintainable in point of law. There is neither reason nor policy to support it." (*i*)

[1] Tillinghast *v.* Fry, 1 Rhode Island, 406.

[2] 1 Sumn. 118; acc. Robinson *v.* Fife, 3 Ohio, N. S. 551.

(*i*) In Calkins *v.* Munsel, *et ux.*, 2 Root, 333, a petition in chancery set forth, that Stephen Calkins mortgaged two hundred acres to the defendants, to secure a debt; that the mortgagor had conveyed a portion of the land to the petitioner, and the residue to others; and prayed to redeem, on payment of the debt to the wife, who had survived her husband. Decreed, that upon such payment she should release to the petitioner, which would put him in the place of the mortgagees, with respect to the mortgagor and his assigns, as to all the lands, except what the petitioner had himself purchased.

A. mortgaged Whiteacre, by an absolute deed, with a defeasance, to secure the payment of notes due on a certain day, and Blackacre, conditioned for payment of the same notes, and, in case of failure, for the surrender of Whiteacre, without suit or trouble. The notes not being paid, A. gave notice that he should surrender Whiteacre, and did subsequently abandon it. Ten months after the notes fell due, the mortgagee took possession. On a bill to foreclose both tracts against A. and the grantee of Blackacre; held, the surrender should have been made in a reasonable time, or when requested by the mortgagee. No request appearing, and no damage in consequence of neglect to surrender immediately on failure of payment, the defendants were permitted to redeem Blackacre, on paying costs and interest on the notes, to be compounded from the expiration of the ten months, and surrendering the defeasance. In case of failure, it was decreed that the equity of redemption to both tracts should be foreclosed. Hunt *v.* Tyler, 2 Aik. 233.

Land subject to mortgage was mortgaged anew to three mortgagees, neither having priority of the others, and it was agreed between them and the

29. In England, until a recent period, an equity of redemption was not *legal assets* in the hands of the heir, but he might plead *riens per descent*. Since the statute of frauds, like a trust, it is held to be assets in equity; but only to pay debts of that description, to which the land would have been liable, if it had been a legal estate. Where the mortgage is

mortgagor, that, if it should become necessary to redeem the first mortgage, each of the three should pay one third of the amount, and that they should be indemnified from the property. One of them paid one third of the first mortgage, and then advanced the balance and took an assignment of the mortgage. Upon a bill in equity brought by him against the other two, to compel them to redeem, held, they should be required to redeem or forfeit all title to the land, and that in this suit the Court would not inquire as to the particular mode in which, under the contract, they were to be indemnified, but this should be subsequently adjusted between themselves. Hubbard *v.* Ascutney, &c. 20 Verm. 402.

In Jenness *v.* Robinson, 10 N. H. 215, some of the heirs of an intestate, holding a mortgage from him, in order to prevent a sale of the land, gave a bond for the payment of the debts, and thus discharged the mortgage. The other heirs bring a petition for partition against them, claiming that their shares of the land should be set off to them, and the respondents left to their action to enforce a contribution for the sum paid to extinguish the mortgage. But it was held, that the respondents were substituted in place of the mortgagees, and entitled to hold as if they were mortgagees in possession, until the amount charged on the share of the petitioners should be paid or tendered; and the petition was dismissed. Parker, C. J. says, (Ibid. 218): — "The principals in that bond have, so far as this case is concerned, complied with the condition of their obligation. They have paid the debts of the intestate. Among those debts was one secured by a mortgage. It is immaterial now to whom that debt was due. It has been discharged, and the estate redeemed from the incumbrance. But this was an incumbrance which affected the interest of all concerned in the estate. If it had not been removed, a foreclosure must have taken the whole land. When the respondents discharged the debt, — as they acted without the request of the petitioners, no right of action accrued against the petitioners for contribution. The respondents had the right so to act, for the protection of their own interests; but the petitioners are not entitled to avail themselves of the redemption, without paying a share of the amount. They are not required to become parties to the redemption, but, if they ask the benefit of it, they must take it with the burden."

made for years, the equity, being incident to the reversion in fee, is, like the latter, legal assets.[1] But now, by St. 3 & 4 Will. 4, c. 104, an equity of redemption is made assets in the hands of the heir for payment of debts.

30. By the English law, an equity of redemption has been held not liable to be taken on *execution*. (*j*)

31. Upon this subject it is said:[2] "It seems impossible to contend, that under the statute of frauds, the sheriff can deliver an equity of redemption upon an execution in a suit against the mortgagor." So in the case of Plunket *v.* Penson,[3] Lord Hardwicke said, he should be glad to be informed, whether there was any instance, where an equity of redemption had ever been held to be liable to the execution of a bond creditor in the lifetime of the mortgagor. To which the counsel in the cause answered, that they did not recollect any such instance. So, in Forth *v.* Duke, &c.,[4] the Vice-Chancellor said: — "A judgment creditor has at law, by the statute of frauds, execution against the equitable freehold estate of the debtor in the hands of his trustee, provided the debtor has the whole beneficial interest; but if he has left a partial interest only, (as an equity of redemption,) the judgment creditor has no execution at law, though he may come into a Court of Equity, and claim there the same satisfaction out of the equitable interest, as he would be entitled to at law if it were legal."

32. But it may be considered as an established principle of American law, that equities of redemption are liable to

[1] 2 Cruise, 123, 124; 1 Hill. on R. P. 396. See Fitzsimmons, &c. 40 Penn. 422.

[2] 1 Sand. Us. 219.

[3] 2 Atk. 290.

[4] 4 Madd. 504.

(*j*) It has been doubted, whether this rule is changed by the statute 1 & 2 Vict. c. 110. But whether it is thus changed or not, it is said a *judgment* constitutes a lien upon an equity of redemption, either of freehold or leasehold property. Coote, 79, 80. A judgment lien upon the equity, if the mortgage is discharged, becomes a lien upon the fee. McCormick *v.* Digby, 8 Blackf. 99.

be taken upon legal process. At common law, as has been stated, only a legal title could be thus seized.[1] And in some of the States, independently of statutory provisions, this rule has been regarded as still in force.[2] (*k*) But in most, and probably all of them, in pursuance of the settled policy of subjecting all forms and kinds of property to the payment of debts, equities of redemption have been in this respect placed, by express legislation, on the same footing with legal estates.

33. It is to be observed, however, that an equity of redemption is liable to be taken upon legal process, only in favor of third persons, or other creditors of the mortgagor than the mortgagee himself. On account of the close connection, and in some respects the absolute identity, between the mortgage and the debt which it secures, and for other reasons, which will presently appear, it has been often decided, that the mortgagee cannot levy an execution, recovered in a suit upon the mortgage debt, on the equity of redemption. Or else, where the mortgagee sells the property upon an execution, and himself becomes the purchaser; he reinstates himself in his old position, and holds subject to redemption.[3]

[1] Van Ness *v.* Hyatt, 13 Pet. 298; Hill *v.* Smith, 2 McL. 446.

[2] Goring *v.* Shreve, 7 Dana, 66, 67. See State, &c. *v.* Lawson, 1 Eng. 269.

[3] Thornton *v.* Pigg, 24 Mis. 249.

(*k*) In South Carolina, a mere equity of redemption is held not liable to sale on execution. But, a statute having declared such equity to be a legal right, it is thereby made liable to be thus taken. State *v.* Laval, 4 McC. 340. In Illinois, it seems, independently of statute, an equity of redemption is not subject to execution. Hill *v.* Smith, 2 McL. 448; nor in Mississippi. In New York, an equity of redemption has been held liable to execution, by the common law of that State. Jackson *v.* Willard, 4 Johns. 41; Hitchcock *v.* Harrington, 6, 290; Collins *v.* Torry, 7, 278. See Mordecai *v.* Parker, 3 Dev. 425.

In Van Ness *v.* Hyatt, 13 Pet. 294, it was held, that an equity of redemption of land, in that part of the District of Columbia, ceded by the State of Maryland to the United States, cannot be taken in execution; the common-law rule, by which such an estate is not liable to be thus taken, having prevailed in Maryland at the time of cession, and never having been changed by any express statute, or overruled by any judicial decision.

34. The following view of the English and American decisions not only illustrates this particular point, but throws light, incidentally, upon the general relation between mortgagor and mortgagee, and parties claiming under them, respectively.

35. The case of Lyster *v.* Dolland,[1] though somewhat obscure, has a bearing upon the point under consideration. In that case, the mortgagee filed a bill of foreclosure, and, pending such bill, and while he was in possession by ejectment, brought a suit upon the bond accompanying the mortgage, took the premises in execution, and they were sold by the sheriff to a trustee for him. No unfairness was suggested. The Lord Chancellor said, if the obligee, having a pledge in his hands, has brought an action against the obligor, and has taken the pledge in redemption, he takes only the equity of redemption under the statute of frauds, which, but for that statute, could not be taken in execution. If he had got a foreclosure, and had afterwards brought an action, and sold it for £5, he would have opened his foreclosure again. I do not think he could have sold it to a stranger. If that offer was made, I would give it all weight. What is to become of the principal case, and the case put in that way, are two different things. But it is new to me, that this case obtains in mortgages. Under the statute, the sheriff may extend an equity; but then the vendee of the equity is in the same case as the defendant in the action, and must proceed as cases in action must, and must make it good by the same means as the defendant must, for it is an extent of a thing in action. The words of the statute are, the sheriff shall deliver in execution to the party any lands, tenements, &c., held in trust for the defendant, as if he had been actually seised or possessed. The statute does not speak of *equitable interests*, and does not at all touch this case.

36. In the case of Atkins *v.* Sawyer,[2] Wilde, J., remarks as follows: — "In the first place it is difficult to determine, in case the sale be held valid, by what title the mortgagee holds

[1] 1 Ves. Jun. 431.

[2] 1 Pick. 356, 357.

the estate after purchasing the equity. The debt being paid by the sale of the equity, he has no right to hold against the mortgagor in the character of mortgagee; for although the legal estate remains in him notwithstanding the payment of the debt, yet after such payment he is bound to restore the possession to the mortgagor, or the latter will be entitled to his bill in equity. It would seem, then, that the mortgagee in such case must hold, if he can hold at all, by virtue of the sale of the equity; but this equity is a right to redeem, and what estate remains for him to redeem after the payment of the mortgage. There can be no further payment, and nothing is to be done by him to complete his title; if, therefore, he holds anything by virtue of the sale, he would seem to hold the estate itself, instead of a right in equity to redeem, which cannot be pretended. This may appear to be a technical difficulty, but it shows that the novel mode of procedure for which the defendant's counsel contends, necessarily leads to great inconsistency. There is another difficulty, however, of much greater importance, and which appears to me insuperable. If the sale of the equity be operative, its operation will be repugnant to the statute regulating the foreclosure of mortgages; it enables the mortgagee at his will and pleasure to reduce the mortgagor's right of redemption from three years to one; thus depriving him of an important right secured to him by the express words of the statute, which in all cases allows the mortgagor to redeem the mortgage at any time within three years after entry for condition broken. This is the necessary effect of the principle contended for by the defendant, and it is the only possible advantage the mortgagee can derive from a sale of the equity. He has before the sale the whole legal estate, and he holds it as security for the same sum before and after the sale, except the costs unnecessarily incurred in the suit on the personal security. This being the effect of the sale of the equity by the mortgagee, it cannot be supported, unless it can be maintained that the statute of 1815 repealed the law respecting the right of redeeming the mortgaged estate, which there is

no pretence for saying. The principal objection to the doctrine now laid down is, that if a stranger becomes the purchaser of the equity, without notice that it is sold to satisfy a judgment founded on the debt secured by the mortgage, he may suffer loss. But the same objection may be made in all cases of sale where there is a defective title. The answer in all such cases is, *caveat emptor*. He may examine the title, or demand a warranty. If he neglects to do it, he cannot impute his loss to any defect in the sale."

37. In Camp *v.* Coxe,[1] the plaintiff brought *scire facias* upon a judgment; and the defence was, that, holding a bond and mortgage of the defendant, he levied an execution, recovered in a suit on the bond, upon the equity of redemption, and himself became the purchaser, for less than the sum due, the sheriff giving notice at the sale that he sold subject to the mortgage. Held, the sale was void, although the statute, relating to sales of equities of redemption, contained no express exception of such a case; that this limitation arose from the act itself and the nature of the subject; that its object was not to foreclose mortgages and make them more effectual as securities to the mortgagee, but to subject the equitable interest of the mortgagor to his creditors having no security; that such a sale is in every case against the contract of the parties, as understood in a court of equity, by which it is stipulated that the mortgagor may redeem. The Court below having rendered judgment for the plaintiff for the balance due on the bond, the defendant appealed, and the judgment was affirmed. But the Court above remark:[2] — "The defendant *has paid nothing*, much less the whole debt. The payment, which at law has been apparently made, will be treated properly, when he shall apply for redemption to that tribunal, which can strip the case of its formal legal vestments, and administer exact justice, according to real rights which can there be seen."

38. In Tice *v.* Annin,[3] Kent, Chancellor, says: — "The true

[1] 1 Dev. & Bat. 52. See Deaver *v.* Parker, 2 Ired. Ch. 40.

[2] 1 Dev. & Bat. 60.

[3] 2 Johns. Cha. 130.

and only remedy for all this mischief," (the sacrifice of the property of mortgagors,) "is to prevent such sales; and I think I shall be inclined, if the case should arise hereafter, to prohibit the mortgagee from proceeding to sell the equity of redemption. He ought in every case to be put to his election, to proceed directly on his mortgage, or else to seek other property, to obtain satisfaction of his debt. I see no other way to prevent a sacrifice of the interest of the mortgagor, and it is manifestly equitable, that the mortgagee be compelled to deal with his security, so as not to work injustice." (*l*)

39. In Goring *v.* Shreve,[1] Judge Ewing remarked:—"The

[1] 7 Dana, 67.

(*l*) The Revised Statutes of New York, (vol. 2, p. 368, § 31,) forbid an execution sale of the equity of redemption, upon a suit by the mortgagee. Palmer *v.* Foote, 7 Paige, 437. The mortgagee may maintain a creditor's bill against other property, after an execution at law for the debt has been returned unsatisfied, without first foreclosing the mortgage, unless such property has been transferred to a third person, as a primary fund. Ibid. In this State, it was formerly held, that, if a mortgagee sells the equity of redemption by execution, to satisfy the mortgage debt, and then proceeds at law against the person of the mortgagor for the balance, or if the whole debt is satisfied by such sale, he must assign the bond and mortgage to the mortgagor, that he may be able to compel the purchaser of the equity of redemption to refund him the debt from the lands mortgaged. But if the mortgagee, by assigning the whole debt and mortgage to the purchaser of the equity, has disabled himself from assigning them to the mortgagor, the debt will be extinguished in the hands of the purchaser. But the mortgagor will not be entitled to receive the purchase-money, for the purchaser will be considered to have bought the land for the price paid, subject to all the residue of the debt secured by the mortgage, beyond what was extinguished by that purchase-money. Tice *v.* Annin, 2 Johns. Ch. 125. If a mortgagee, instead of a bill for foreclosure, proceed against other property of the debtor, his proceeding will be stayed, or he will be required to assign over the securities to the mortgagor. The Court will restrain a mortgagee from proceeding at law to sell the equity, or require him to elect, either to proceed directly on his mortgage, or to seek other property, (where the rights of other creditors do not interfere,) or the person of the debtor, for the satisfaction of the debt. Ibid.

sacrifices, mischiefs, and embarrassments, produced by such sales, bring us to the conclusion, that they were unauthorized by the wisdom of the common law." And, in the same case, in construction of a statute of Kentucky, which provided, in general terms, for the seizure and sale on execution of property mortgaged, as if no incumbrance existed: "and the purchaser shall take it subject to such incumbrance," which he may "pay off;" it was held by the Court, that this enactment did not apply to the claim of the mortgagee himself, which is perfectly secured without this additional remedy. The Court remark:[1] — The act "provides that the purchaser shall take the property purchased, subject to the incumbrance, and may pay off and discharge the same; which certainly implies that the incumbrance is not extinguished by the purchase, but remains in full force, and must be paid off by the purchaser, to entitle him to the estate. But if he purchase in satisfaction of the mortgage debt, each bid he makes will reduce the amount of the mortgage debt, and if he bid the whole debt, the whole amount of the incumbrance will be extinguished, and his responsibility not increased, or his purchase rendered more valuable, than if he had bid only a single dollar or cent, unless he be made subject to pay the amount of the incumbrance, notwithstanding its extinguishment by the purchase. And if he be still liable to pay it, to whom shall he pay it? Not to the mortgagee, for his debt is paid; and not to the mortgagor, for his equity of redemption is purchased. So that he is permitted to buy the estate, subject to the incumbrance, when, by the operation of the sale, the incumbrance is extinguished, and he has nothing to pay for it, and consequently gets the whole estate, for the amount bid for the equity of redemption alone. Such a trap for the sacrifice of estate under execution, never in our judgment entered into the mind of the legislature; nor will we give to their enactment such a mischievous construction." The same construction is further fortified by a consideration of the statutory provisions; that the mortgagor, in order to

[1] 7 Dana, 69.

redeem, must pay, not only the purchase-money, but the amount paid by the purchaser in *extinguishing* the incumbrance; that security shall be given for the forthcoming of the property, to abide any order or decree in equity; and that the Court shall have the control of the property, whether there be a forfeiture of the mortgage or not; all contemplating the continuance, and not the extinguishment of the mortgage.

40. In Alabama, the mortgagor may file a bill to redeem, after such sale, though possession has been recovered at law.[1] And the mortgagee will be held to account for the damages recovered by him, and for the value of the crop growing at the time of ouster, deducting the probable cost of cultivation.[2]

41. In Mississippi, if the mortgagee, or those claiming under him, cause an execution, issued upon a judgment founded on the mortgage debt, to be levied upon the land; a purchaser at sheriff's sale cannot, upon that ground, in a case unmixed with fraud, oppose an application for foreclosure; though he may be substituted to the rights of the mortgagee to the extent of the amount of his bid.[3]

42. A similar rule has been applied, in Connecticut, to an attempted levy upon the mortgagor's interest by *a creditor* of the mortgagee. (*m*) Thus, in Rowe *v.* Couch,[4] a creditor of the mortgagee levied an execution upon the mortgaged premises, by appraisement, in satisfaction of the debt. The plaintiff, being the mortgagor, brings an action against a third person, who had undertaken to restore certain collateral security upon payment of the mortgage debt, alleging that

[1] Powell *v.* Williams, 14 Ala. 476.
[2] Ibid.
[3] Baldwin *v.* Jenkins, 23 Miss. 206.
[4] 1 Root, 452.

(*m*) In Michigan, it has been held, that the "act to provide for the transfer of real estate in execution," (S. L. 1842, p. 135,) does not authorize an appraisal and set-off of mortgaged premises in satisfaction of the mortgage, without previous proceedings to foreclose, either in equity or by advertisement. Buck *v.* Sherman, 2 Doug. 176.

such debt was paid by this levy. The Court say:[1] — "The plaintiff hath not paid his debt. Bacon's taking the farm by execution may entitle him to receive the money from the plaintiff, but hath not altered the nature of the mortgaged premises, nor in any manner paid or satisfied the plaintiff's debt."

43. In Pierce *v.* Potter,[2] it was held, that such a sale extinguishes the lien of the mortgage, and vests a good title in the purchaser. But if the land be sold to the mortgagee for less than the mortgage debt, it is not such an extinguishment of the debt, as will enable the mortgagor to compel an entry of satisfaction upon the mortgage, or bring an action for a refusal to make it. The statute, making provision for such an action, gave to *the party aggrieved* a certain penalty; but the mortgagor, having lost all interest in the property by the execution sale, did not fall under this description. The Court remark, in reference to the effect of the sale:[3] — "Though the words of the act are, that the lien of such mortgage shall not be destroyed or in any way affected by any sale made by virtue or authority of any writ of *venditioni exponas*, yet when the whole section is considered in reference to this case, it is perfectly obvious that it cannot be held to embrace it. Here the writ of *venditioni exponas* includes the same debt mentioned in the mortgage, so that, of necessity, the sale by virtue of it could not but affect the lien of the mortgage, by reducing, at least, if not wholly discharging the debt, accordingly as the amount bidden at the sale might happen to be less or equal to the amount of the debt. It cannot be supposed that the legislature intended to exceed their power by extending the act to the case of a writ of *venditioni exponas*, grounded upon a judgment in favor of the mortgagee against the mortgagor for the same debt secured by the mortgage, because either a reduction or an entire payment of the debt by a sale under the writ would necessarily destroy or at least affect by lessening the amount

[1] 1 Root, 453. [2] 7 Watts, 475. [3] Ibid. 477.

of the lien of the mortgage. And it was not in the power of the legislature to continue the lien of the mortgage after the payment of the debt, though it was produced by a sale under the writ." (*n*)

44. One having a judgment, recovered in 1832, which was a lien upon premises covered by a prior mortgage dated in 1829, caused them to be levied on and sold, and himself became the purchaser. The sale becoming absolute, he took a deed from the sheriff, and the mortgage was foreclosed under the statute. Held, the judgment creditor acquired no legal title, which could be set up in defence to an action of ejectment. Browning, J., says: — He "must claim in one of two

---

(*n*) The following cases in the same State (Pennsylvania,) illustrate the general subject treated in the text. By the statute of April 6, 1830, the lien of a mortgage is not devested by a sheriff's sale of the premises, where it is prior to all other liens; and as in such case a subsequent judgment creditor can sell only the right of redemption, the mortgagee cannot claim payment of his debt from the proceeds of sale. Bratton, &c., 8 Barr, 164.

If a mortgagee purchase the premises at a sheriff's sale, which does not devest the mortgage, and retain the price; so much of the price as is payable to prior liens will not be applied to the mortgage, though six years have elapsed since the sale. Mott *v.* Clark, 9 Barr, 399.

Land charged with a legacy, and subject to a subsequent mortgage, was sold on execution. The case was referred to auditors, to report the facts, by whom depositions were taken, after notice to the execution purchaser, and a purchaser from him. It was proved that the purchaser agreed to buy the sheriff's sale, subject to the mortgage, and the Court decreed that the proceeds of sale be applied to other and subsequent liens. Held, the second purchaser was bound by the decree, and took subject to the mortgage; and, upon a *scire facias* against him and the mortgagor, that it was not competent for them to offer evidence that notice was not given to such purchaser, or that the land was not sold subject to the mortgage. Towers *v.* Tuscarora, &c., 8 Barr, 297.

A sheriff's sale, under a judgment confessed for the interest on a bond secured by mortgage, relates back to the date of the mortgage, and therefore discharges it, although the defendant alienated the land before the judgment; though the mortgage does not expressly mention interest, but is conditioned for the amount mentioned in the bond. Hartz *v.* Woods, 8 Barr, 471.

ways, and not in both. He must say, either that he was the owner of the equity of redemption at the time of the mortgage sale, or that he was a judgment creditor having a lien. If he claims the equity of redemption, the answer is that that interest has been foreclosed; if he claims merely as a judgment creditor having a lien, he must then go into equity and redeem. He clearly has no title at law."[1] (*o*)

45. In the case of Bronson *v.* Robinson,[2] it was held, that, if land be mortgaged to a surety, to secure him against his liability for the mortgagor; it cannot be taken in execution by the creditor in a suit upon that debt. The Court remark:[3] — "Although the creditor is not the actual mortgagee, his debt is nevertheless secured by the mortgage. Though not nominal mortgagee, he is entitled to the benefit of the mortgage, and may enforce it in equity, and cannot, while he retains this right, be regarded as a general creditor, or a stranger to the mortgage; for he has a lien in equity for his security. The mortgage secures the execution debt, although the execution creditor is not the mortgagee; and the execution debt is in truth the mortgage debt." They proceed to remark, that the reasons given in Goring *v.* Shreve, (p. 411,) showing that the statute, which authorizes the levy of an execution upon equities of redemption, is inapplicable to an execution upon the mortgage debt; have equal force in the present case. "And although this construction may throw the creditor into a court of chancery, because his debtor, without consulting him, has made a mortgage which secures his debt, this is no more than the debtor could have done before the enactment of the statute. And he is left in that condition, not as a consequence of anything he has done,

[1] Klock *v.* Cronkhite, 1 Hill, 108, 110, 111.

[2] 4 B. Mon. 143.

[3] Ibid.

(*o*) Where a mortgagee sues on his bond, levies on the equity, and buys it himself, the equity merges in the legal estate. Hill *v.* Smith, 2 McL. 446. So whether he buys all or a part of the mortgaged estate. Ibid.

but because the statute, upon fair construction, does not apply to his case; and because, if the statute could be construed otherwise, and if it should be supposed, that not having voluntarily taken a mortgage, he is entitled to a favorable construction of it; we say, that the evils which must follow from an extension of it to his case, greatly outweigh the partial inconvenience which he may sustain from not being embraced in the statute."[1]

46. In Ohio, it is held, that, if the property be taken and sold on execution for any part of the mortgage debt, the purchaser will hold it clear of the incumbrance.[2]

47. In Maine, if a judgment creditor extend his execution on land mortgaged for the same debt, and the debtor neglect to redeem within a year; the creditor acquires an absolute estate, notwithstanding the mortgage.[3]

48. Where the promisee of a negotiable note secured by mortgage negotiates the former without assigning the latter; the indorsee may attach and sell on execution the mortgagor's equity of redemption, in a suit upon the note.[4] The difference, in this respect, between such indorsee and the mortgagee himself, is said to be,[5] that the latter already holds the land by contract, in such manner as to give the mortgagor certain legal rights as to the time and manner of defeating his estate, and, therefore, he ought not to be allowed to resort to process against the same land, which will necessarily abridge those rights. But no such contract, express or implied, is made with the indorsee, who is presumed to have taken the note in the manner such securities are usually transferred. The proceeding is admitted to be attended with difficulties; but these may be avoided by the mortgagor, by giving a bond or a note not negotiable with the mortgage, either of which, though assigned, must be sued in the name of the original holder, and the plaintiff restricted to the same means of enforcing payment, as the

[1] 4 B. Mon. 144.
[2] Freeby *v.* Tupper, 15 Ohio, 467.
[3] Porter *v.* King, 1 Greenl. 297.
[4] Crane *v.* March, 4 Pick. 131.
[5] Per Parker, C. J., Ibid. 135, 136.

mortgagee himself would have been. But negotiable notes have become so common a medium of business, that their efficacy ought not to be restrained. It may be objected to the foregoing decision, that a mortgagee, holding a negotiable note, and desirous to attach and levy upon the equity of redemption, would be enabled to effect his object, by making a fictitious transfer of the note. But all that the law can do in regard to fraudulent practices is, to avoid them when they are proved to exist. (*p*)

49. But where the note and mortgage have both been assigned, the assignee cannot, any more than the original mortgagee, levy his execution upon the equity of redemption. Thus James Goodwin gave to John Goodwin a note secured by mortgage, and John, on the same day, indorsed the note, and assigned the mortgage to Giles. James afterwards died, having devised all his real estate to John, and appointed him executor of his will. John afterwards gave to Giles his note for the sum due on the other note, which new note contained a memorandum that, when paid, it should discharge the note of James. Giles immediately brought an action on the new note against John, recovered judgment, and levied his execution upon John's equity of redemption. The proceeds of this sale and of the sale of certain chattels were indorsed on the mortgage note. The plaintiff, being the execution purchaser, brings an action against John to recover the mortgaged premises. In giving the opinion of the Court, that the action could not be maintained, Wilde, J., refers to the above-cited case of Atkins *v.* Sawyer, and remarks as follows: — "In this case, the equity was sold to satisfy, in part, a judgment recovered by an assignee of the mortgage; but this makes no difference, for

(*p*) The assignee of a mortgage debt levied an execution, in an action upon such debt, on the property mortgaged. After an acquiescence of four years, held, a purchaser from the execution purchaser, without notice of the mortgage, should not be disturbed in his title by the mortgagee or his assignee. Waller *v.* Tate, 4 B. Mon. 533.

the assignee has the same rights which the mortgagee had, and no greater, and by the sale of the equity he could obtain no additional security. If the mortgage debt had been assigned without the mortgage, the sale would have been valid, according to the decision in Crane *v.* March, 4 Pick. 131. But here, the mortgage having been assigned with the debt, the case cannot be distinguished from that of Atkins *v.* Sawyer. Nor does it make any difference, that John Goodwin, the son of the mortgagor, after his decease, gave his note for the amount due on the mortgage, and that the equity was sold to satisfy a judgment recovered on that note. This note was given merely as additional security, and operated as such as to the sale of the property which was not included in the mortgage. But the mortgage was not discharged. The assignee still held the original note against the mortgagor, and the proceeds of the sale of property on the execution against John Goodwin, were indorsed on the note against James Goodwin, the mortgagor. On these grounds, we are of opinion that the sale of the equity is void; and the plaintiff's title fails." [1] (*q*)

50. Where the same land is twice mortgaged, the first mortgagee may levy an execution, recovered in a suit on the mortgage note, upon the right of redeeming the second mortgage; more especially if the second mortgage includes other land. The Court remark: — "The mortgagor, by his own

[1] Washburn *v.* Goodwin, 17 Pick. 137, 139.

(*q*) A mortgagee of personal property brought an action for the debt, and attached the mortgaged property. Afterwards, the mortgagor having petitioned under the insolvent law, the mortgagee waived the attachment, and suffered the messenger to take the property. Held, he had not thereby lost his right to petition the master in chancery for a sale of it; more especially as it did not appear that the mortgagee ordered an attachment of these particular goods, and there were others, not included in the mortgage. The Court took a distinction between this case, of a mortgage, where the title does not depend on actual possession, and a mere lien, like the right of retaining possession for services done, where an attachment would be a waiver of the lien. Barnard *v.* Eaton, 2 Cush. 294, 304.

act, created a new equity of redemption, partly in the land previously mortgaged — and partly in other land. No part of this new equity was the subject of any contract between Fairfield (the first mortgagee) and the tenant. The contract between Fairfield and the tenant, which the former is not permitted to violate, extends only to the right of the latter to redeem the first mortgage." The rights of redeeming the two mortgages are distinct rights. If a different rule were adopted, "a mortgagor, by giving a second mortgage of the same land to a different person, and including in it other land also, might place a part of his property, which the first mortgagee might otherwise resort to — out of the reach of such mortgagee. For, when a mortgage is made of different tracts — we know of no law by which the equity of redeeming one of the tracts only can be sold." [1]

51. In England, an equity of redemption is subject to *curtesy*, if the wife is in possession of the land during coverture. For, though such possession is a mere tenancy at will, it is, in equity, that of the real owner, subject only to a pecuniary charge. Nor is the husband to be deprived of curtesy on the ground of *laches*, in not paying off the mortgage and thereby acquiring an absolute title, by analogy to the rule which requires of him actual entry upon a legal estate of the wife; for payment of a mortgage is a far more difficult matter than a mere entry upon land, besides that the mortgagee is entitled to notice before he is bound to accept such payment. Upon these grounds, a decision of Sir Joseph Jekyll, disallowing curtesy in an equity of redemption, was reversed by Lord Hardwicke.[2]

52. A different rule, however, has prevailed in relation to *dower*. In general, dower is more peculiarly favored by the law than curtesy or any other estate. A dowress is said to be in the care of the law and a favorite of the law; [3] to have an equitable and a moral right, favored in a high degree by

[1] Johnson *v.* Stevens, 7 Cush. 432, 434, 435.

[2] 1 Hill. on R. P. 395; Casborne *v.* Inglis, 2 Ab. Eq. 728; 1 Atk. 603. See Hitner *v.* Ege, 23 Penn. 305; Sentill *v.* Probeson, 2 Jones, Eq. 510.

[3] 1 Story's Eq. 583.

law, and next to life and liberty held sacred.[1] Moreover, dower is a regular subject of equity jurisdiction; (*r*) and it has been said to be unconscientious to turn the widow over to law for the recovery of a provision necessary to her immediate subsistence.[2] Yet, it would seem upon purely technical grounds, the mere circumstance of an estate's being incumbered by mortgage has been held in England to preclude a widow from taking any share therein. Chancellor Kent says:[3] — "In England, dower is considered as a mere legal right, and equity follows the law, and will not create the right where it does not subsist at law."

53. In Banks *v.* Sutton,[4] it was held by Sir Joseph Jekyll, M. R., that the widow of a mortgagor in fee should be endowed of the equity of redemption, upon paying a third of the mortgage-money, or keeping down a third of the interest. This decision was based upon the grounds, that dower is a moral, a legal, and an equitable right, and entitled to more favor than courtesy, which has always been allowed in equities of redemption. Sir Joseph Jekyll closes an elaborate and learned opinion by saying:[5] — "I do not know nor can find any instance, where a dower of an equity of redemption was controverted, and adjudged against the dowress; and as there are authorities in cases less favorable, therefore I declare, that the plaintiff being the widow of the person entitled to the equity of redemption of this mortgage in question, (which was a mortgage in fee,) hath a right of redemption; and accordingly decree her the arrears of her

[1] Kennedy *v.* Nedrow, 1 Dall. 417.
[2] 1 Story's Eq. 579.
[3] Titus *v.* Neilson, 5 John. Ch. 454.
[4] 2 P. Wms. 701.
[5] Ibid. 719.

(*r*) In Massachusetts, Parker, C. J., remarked, (Bolton *v.* Ballard, 13 Mass. 230,) "This right may be enforced in England by the intervention of the Court of Chancery."

In another case, (Snow *v.* Stevens, 13 Mass. 280,) the same judge remarks: "The interest of the widow in such estate is protected by the Court of Chancery."

dower from the death of her husband, she allowing the third of the interest of the mortgage-money unsatisfied at that time, and her dower to be set out, if the parties differ."

54. In Attorney-General *v.* Scott,[1] Lord Talbot decreed against a claim of dower in a trust estate; treating a trust as exactly the same interest with a use before the statute of uses, in which dower was never allowed. He cites as an authority the case of Bottomly *v.* Lord Fairfax, Pasch. 1712, Prec. in Chan. 336, and remarks, in reference to another decision, cited in the argument: — "For me, therefore, to do a thing merely upon the authority of an obscure case, (namely, Fletcher *v.* Robinson,) which does not seem to have been determined upon that point neither, and that might perhaps shake the settlements of five hundred families, is what I cannot answer to my conscience."

55. This decision has been since uniformly adhered to. And no peculiar equities on the part of the wife will operate to change the rule in her favor; as, for instance, the facts, that the husband expressed his expectation and desire that she should have dower, and was so instructed by the person who drew his will; that the wife is left for the most part otherwise unprovided for; and that certain articles of luxury, such as a coach and horses and plate, are bequeathed to her, for which she can have no use without dower to support her.[2] (*s*)

56. In the United States, this rule has been extensively if not universally changed, either by legislative enactment or judicial decision. In North Carolina, Virginia, Illinois, Indiana, Tennessee, and Ohio, (*t*) dower is allowed in all

[1] For. 138.

[2] Dixon *v.* Saville, 2 Cruise, 117; 2 Pow. 693; 1 Bro. 325.

(*s*) But, by St. 3 & 4 Will. 4, c. 105, § 2, a widow may claim dower in equity from any beneficial estate or inheritance in possession, except joint tenancy, in which she is not dowable at law. 1 Steph. 349, 350.

(*t*) In Tennessee, it has been held that there is no dower in lands mort-

equitable estates.[1] Chancellor Kent says,[2] dower is allowed in equities of redemption in Massachusetts, New York, Connecticut, New Jersey, Pennsylvania, Virginia, Alabama, Indiana, and probably most or all of the other States. (*u*) It

[1] 1 Vir. Rev. C. 159; Illin. Rev. L. 909; McMahan *v.* Kimball, 3 Blackf. 627; 1 N. C. Rev. St. 614; Ind. Rev. L. 209; Ten. St. 1823, 46; 4 Griff. 6.

[2] 4 Kent, 44.

---

gaged by the husband, because he did not die seised and possessed of them. McIver *v.* Cherry, 8 Humph. 713.

In Mississippi, a wife may expressly release her right of dower, and the signing and acknowledgment of a mortgage by a wife, and its delivery to the mortgagee as her act and deed, will conclude her of her dower. McLean *v.* Ragsdale, 31 Miss. 701.

(*u*) In Michigan, if the heir or other representative of the mortgagor redeem the land, the widow may either pay her share, and take one third of the land, or take so much less than a third as will be equivalent to her share of the debt. Mich. Rev. St. 262, 263. By a late statute, in case of a mortgage before marriage, the widow has dower as against every person except the mortgagee and those claiming under him.

When a husband purchases lands during coverture, and at the same time mortgages such lands to secure the purchase-money, his widow, though not joining in the mortgage, has no dower as against the mortgagee, or those claiming under him, but she shall be entitled to her dower as against all other persons.

When, in either of the cases above mentioned, or in case of a mortgage in which she joins with her husband, the mortgagee, or those claiming under him, after the death of the husband, cause the mortgaged premises to be sold by virtue of such mortgage; if a surplus remains after payment of the debt and costs, the widow shall be entitled to the interest or income of one third part of such surplus, for her life, as dower.

If the heir, or other person claiming under the husband, pay the mortgage, the widow shall have set out to her the value of one third of the residue after deducting such payment. Mich. Comp. L. 1857, p. 850.

In Arkansas, where mortgaged land is sold after the death of the husband for the mortgage debt, the widow shall have the interest of one third of any surplus. Ark. Rev. St. 337. In Vermont, the widow of a mortgagor has dower upon payment of her proportion of the debt, under direction of the probate court. If the heir, &c., pay the debt, she has one third of the land, deducting the value of the payment. The administrator is required to pay the mortgage, if for the benefit of those interested to redeem, either from the personal, or by sale of the real estate. If there is sufficient personal property,

will be interesting and profitable to trace the course of adjudications upon this subject in the several States, indicating throughout a strong desire and purpose to be governed rather by the general spirit of the English law, so peculiarly favorable to the right of dower, than by its harsh application of mere technical rules to this particular instance of the claim.

57. In New Jersey, in the case of Montgomery *v.* Bruere,[1] the Court, (Southard, J., dissenting,) went very largely into a consideration of this subject, and came to the conclusion that dower should not be allowed in an equity of redemption. They proceed upon the ground, that, as between the mortgagee and mortgagor, the former is seised of the freehold, the latter being merely his tenant at will, or quasi tenant at will; and that in a court of law the widow of the mortgagor could not claim dower, either on account of an equitable seisin of the husband, or a legal seisin of the mortgagee, as his trustee. They further held, that the claim could not be allowed even in a court of equity, the case of Banks *v.* Sutton, the only one favoring such allowance, having been decisively overruled by subsequent cases.

58. In the same State it is held, that the widow of one seised of an equity of redemption is not entitled to dower against the mortgagee or his assignee, though the mortgagee has purchased the equity of redemption; but he will be considered to hold under the mortgage.[2] (*v*)

[1] 1 South. 260.

[2] Thompson *v.* Boyd, 1 N. J. 58.

---

the Court may order dower in the whole land. Verm. Rev. St. 289. In Wisconsin, (Rev. Sts. 333,) there is no dower, where the mortgage was made to secure the purchase-money of the land. In case of sale by the mortgagee after the death of the husband, the widow has the income of one third of the proceeds. If the heir, or other person claiming under the husband, pay the mortgage; one third of the balance of the value of the land. The law in Arkansas is substantially the same as in Wisconsin. It is further provided, that the widow of a mortgagee shall not have dower. Ark. L. 445, 446.

(*v*) The owner of an equity of redemption having died, leaving a widow,

59. In Stelle *v.* Carroll,[1] the English rule, against allowing dower in equities of redemption, was held to be in force in the State of Maryland, when the United States assumed jurisdiction over the District of Columbia, though since changed by statute. Hence, where mortgages were made during coverture, but the mortgages acknowledged by the wife, according to the statutory requirement, upon privy examination; it was held, that the legal estate passed to the mortgagee, the husband retaining only an equity of redemption; and, as the wife had no right of dower in this equity, a subsequent deed, executed by the husband alone, passed his whole title, and barred the claim of dower.

[1] 12 Pet. 201.

---

the land was sold at auction, for the expressed purpose of paying the mortgage; a clear title to be given the purchaser. The assignee of the mortgage became the purchaser, deducted the amount of the mortgage debt from his bid, paid the balance, released the mortgage bond, but retained the mortgage for the purpose of defending against any claim for dower. Held, he had a right so to do, and the widow was not entitled to dower against him. Thompson *v.* Boyd, 1 N. J. 58.

Devise of mortgaged lands to two sons of the testator. One of them released to the other, who died, having empowered his executors to sell other parts of his estate. An act was passed, authorizing them to sell the mortgaged property, free from incumbrance, and they sold to an assignee of the mortgage, who also held another mortgage, which he cancelled and surrendered, retaining the first mortgage as a monument of title, and paying them the balance of the price. The widow of the son brings an action for her dower. Held, her only remedy was a bill in equity to redeem, the mortgage being a paramount title, and not affected by the act in question. Ibid., 2 N. J. 543. It is now held in New Jersey, that a widow is entitled to dower in an equity of redemption, and a court of equity will protect her right thereto. Where upon the death of a mortgagor the land is sold, under a decree of Court, the surplus, after satisfying the mortgages, represents the equity of redemption, and the widow of the mortgagor is entitled to her dower in it. Where land was sold under a prior mortgage, in which a wife joined, and her husband was dead at the time of sale and foreclosure, the Court will give the widow her third of the surplus as against a mortgagee, whose mortgage she did not unite with her husband in executing. Hinchman *v.* Stiles, 1 Stockt. 361, 454.

60. In Mayburry *v.* Brien, McLean,[1] J., says: — "By the common law, dower does not attach to an equity of redemption. The fee is vested in the mortgagee, and the wife is not dowable of an equitable seisin. This rule has been changed in Maryland by the tenth section of the act of 1818, ch. 193, which gives dower in an equitable title under certain restrictions; and in many of the States a different rule obtains by statutory provision, or by a judicial modification of the common law. As the right of the complainant depends on conveyances prior to 1818, the above statute can have no effect upon it." So, where there was a conveyance to A., in trust for B. during the life of B., and after his death in trust for A., his heirs and assigns, and, before the death of B., A. mortgaged to C.; held, the widow of A., married to him after the mortgage and before the death of B., was not entitled to dower in the land at common law, nor under the act of 1818, ch. 193, to the prejudice of the mortgagee or of the purchaser of the equity.[2]

61. But it has been more recently decided in Maryland, that the widow of a mortgagor, who joined in the mortgage, may claim dower, subject to the mortgage, and redeem; and that she may require the personal representatives to apply the personal assets in discharge of the incumbrance.[3] If she has in the mortgage legally relinquished her dower, a sale of the lands to satisfy the mortgage debt will extinguish her claim to dower, whatever right she may have to a share of the proceeds of sale.[4] But where, after a legal assignment of dower, the land was sold under a decree to satisfy the mortgage debt, the widow shall still be endowed from the husband's remaining estate.[5]

62. Numerous decisions upon the subject have occurred in New York. In Hitchcock *v.* Harrington,[6] the mortgagor died in possession, after the debt became due and before foreclosure; and he was held to have died seised, in respect to the

[1] 15 Pet. 38.
[2] Miller *v.* Stump, 3 Gill, 304.
[3] Mantz *v.* Buchanan, 1 Md. Ch. 202.
[4] Ibid.
[5] Ibid.
[6] 6 Johns. 290. See Lewis *v.* Smith, 11 Barb. 152.

dower of his wife, and she was held entitled to dower, as against a purchaser from the heir, who had paid off and satisfied the mortgage. So in Collins *v.* Torry,[1] it was held, that the widow of a person purchasing from the mortgagor, subsequent to the mortgage, might recover her dower against a purchaser under the husband, who could not set up the mortgage, even as a subsisting title, there having been no entry or foreclosure under it. So in Tabele *v.* Tabele,[2] the widow of a mortgagor, being made a party to a bill of foreclosure, and having answered and submitted to the decree of the Court, was held entitled to the use of one third of the surplus proceeds of the sale, after paying the debt, as her equitable dower, and to her costs, to be paid from the other two thirds. So in Titus *v.* Neilson,[3] the wife of a mortgagor joined in a mortgage, and the latter afterwards made another mortgage, in which she did not join. The mortgagee filed a bill for sale of the premises, and after a decree, but before sale, the mortgagor died. Held, his widow should be endowed from the surplus proceeds, after paying the first mortgage. So in Coles *v.* Coles,[4] it was held, that where an owner in fee mortgages the land and afterwards marries, his widow shall have dower from the equity of redemption, against a purchaser of that equity, though the mortgage be still subsisting. Upon this case Chancellor Kent remarks:[5] "Here was a final and full establishment in our courts of law of the principle not admitted in the English courts of law, that a wife could be endowed of an equity of redemption arising upon a mortgage in fee, and this Court ought to follow the rule of law."

63. In the same State, where a wife pledges her own property for the debt of the husband, she may claim the legal rights and privileges of a surety. But if she join in a mortgage of his property, she cannot claim, after his death, to have it satisfied wholly from his interest, thus giving her dower

[1] 7 Johns. 278.
[2] 1 Johns. Ch. 45.
[3] 5 Ibid. 452.
[4] 15 Johns. 319.
[5] Titus *v.* Neilson, 5 Johns. Ch. 457; acc. Denton *v.* Nanny, 8 Barb. 618.

in an unincumbered estate, instead of an equity of redemption. Thus, if the property is sold under the mortgage, she shall be endowed only from the surplus remaining after payment of the debt and costs of foreclosure. Chancellor Walworth says: — "Strictly speaking, the wife has no estate or interest in the lands of her husband, during his life, which is capable of being mortgaged or pledged for the payment of his debt. Her joining in the mortgage, therefore, merely operates by way of release or extinguishment of her future claim to dower as against the mortgagee, if she survives her husband, but without impairing her contingent right of dower in the equity of redemption."[1]

64. In the case of Van Duyne *v.* Thayre,[2] Nelson, J., says: — "The widow of a mortgagor is entitled to dower in the equity of redemption, upon the ground that, until foreclosure or entry, he holds the legal title; but her estate is subject to the incumbrance, and may be defeated by a legal enforcement of it.[3] She may pay off the mortgage and thereby protect herself. The subsequent intermarriage of the mortgagor is not to be permitted to affect the security, or any of the remedies under it. If the mortgagee after forfeiture entered into possession, either by the consent of the mortgagor, or by means of legal proceedings, he may defend himself there, at least till his debt is paid; and the widow has no rights in this respect, beyond what would belong to her husband, the mortgagor, if living." After the mortgagee's death, the heirs may "set up their possession, as representing the legal estate in the mortgaged property after forfeiture, in bar of the widow's claim to dower, just as they might have done if an ejectment had been brought against them by the mortgagor, the husband. The widow may pay off the mortgage, and her right then is perfect; and then a release of the equity of redemption, even if valid against the mortgagor and his heirs, would be inoperative as to her."

65. In Cooper *v.* Whitney,[4] it was held, that dower is re-

[1] Hawley *v.* Bradford, 9 Paige, 200, 201.
[2] 14 Wend. 235.
[3] 7 Johns. 283.
[4] 3 Hill, 95.

coverable in an equity of redemption, but the widow has no remedy at law. So, where A. executed a mortgage, in which his wife did not join; and afterwards conveyed to B., subject to the mortgage, his wife joining; and B. subsequently reconveyed to A.: held, the wife's inchoate right of dower was extinguished by the deed to B., and was not restored by the reconveyance as against the mortgage, and she was dowable only of the equity of redemption.[1]

66. In the same State it has been held, that, where a husband dies after a decree of foreclosure sale, and after the sale, there is no dower in the surplus proceeds.[2] But where a wife joins in a mortgage, with the usual power of sale, and, in the event of a sale, the surplus is expressly reserved to be paid to the mortgagors, she has a right to have the residue, not required to satisfy the mortgage, whether it exists in lands unsold, or in the proceeds of land sold under the decree of foreclosure, so appropriated, as to secure her dower, in case she survives her husband.[3]

67. A purchaser under a decree of foreclosure and sale in equity, in the lifetime of the husband, when the wife is not made a party, takes the estate subject to her equity of redemption. In order to bar her, she must be a party to the suit.[4] And, where there are surplus moneys in court, arising from the sale, she is entitled, as against judgment creditors, to have one third invested for her benefit, and kept invested during the joint lives of herself and her husband, and during her own life in case of her surviving her husband, as and for her dower in such surplus moneys.[5]

68. In Massachusetts, a series of cases may be found upon the same subject.

69. In the case of Popkin *v.* Bumstead,[6] (*w*) the wife of a

[1] Hoogland *v.* Watt, 2 Sandf. Ch. 148.
[2] Frost *v.* Peacock, 4 Edw. Ch. 678.
[3] Denton *v.* Nanny, 8 Barb. 618.
[4] Denton *v.* Nanny, 8 Barb. 618.
[5] Ibid.
[6] 8 Mass. 491.

(*w*) See *infra*, § 72, for some remarks upon this case. In Eaton *v.* Simonds, (14 Pick. 107,) Wilde, J., remarks further, with regard to it: — "The

mortgagor joined in the mortgage, and, after his death, a purchaser of his estate from his administrator paid the debt, and the mortgage was discharged upon the record. It was held, that the purchaser thus acquired the legal interest in the estate, which gave him the whole title, and that the mortgagor's widow was not thereby let in to her dower. In giving their opinion, the Court remarked :[1] — "It would be singular if, when the tenant had paid the money due on the mortgage, and supposed he had thus perfected his estate, by extinguishing the only incumbrance he knew to exist upon it, he should by that act revive the claim of the demandant, which she had before solemnly renounced under her hand and seal, and which, as he was under no obligation, it cannot be presumed he meant to do. But the facts produce no such absurdity. When the tenant purchased the equity of redemption, it belonged to him to pay the money due on the mortgage, and thus rid his estate of that incumbrance. Having all the equitable interest in himself, when he had paid the money due by the mortgage, the legal estate followed the equitable interest, and he became seised of the whole fee-simple. If this were not the plain legal operation of the transaction, the law would construe the discharge of the mortgage by the mortgagee a release of the legal estate by him to the tenant, who had become lawfully possessed of the equitable interest,

[1] 8 Mass. 493.

---

defendant had purchased of the administrator of the mortgagor, and thereby acquired the same rights which the administrator would have had if he had paid off the mortgage for the benefit of the heirs. The mortgage was paid off after the death of the mortgagor, when the widow's right of dower had become perfect, and it might therefore be supposed, that she was not entitled to dower without contributing her share of the redemption money.

"Unless the case can be supported on some such distinction, it is difficult to perceive any legal or equitable ground on which it can stand. It is difficult also to say how that case could be decided on rules of equity, it being an action at law; but unless the principle of contribution does apply, the case seems opposed to the whole current of the authorities."

and from whom the consideration for that discharge flowed, rather than such a mischief should follow."

70. In the case of Bird *v.* Gardner,[1] Moies conveyed the premises in question to Bird, having previously made a mortgage to Hawes, which Hawes had assigned to Gardner, the tenant. Bird then mortgaged anew to Gardner, and afterwards released to him all his right and title in and to the premises, and Gardner entered and remained still in possession. The widow of Bird brings a writ of dower against the tenant. Held, the action could not be maintained. Sewall, J., remarks: — "The first mortgage remains unpaid; and the tenant has therefore the legal title, as it was conveyed by Moies, before Bird had any interest in the premises. It is upon the strength of that title, by Hawes's assignment, vested in the tenant, that he is enabled to resist the demand of dower. The title of Bird was a seisin during the coverture, whereof the widow was entitled to dower against all other persons than Moies's mortgagee and his assigns. But against them, until the redemption of the mortgage, the demandant's husband had nothing but an equity of redemption, no seisin of any estate, of which his wife was dowable. It is well settled that a wife is not dowable of an equity of redemption. The demandant's right of dower might be maintained against the second mortgage, that which her husband in his lifetime made to the tenant, if his title under the first mortgage were removed; and it may be that in a court of chancery, having a general jurisdiction in matters of equity, the demandant might have relief, and her demand of dower might be enforced by some specific remedy, to compel the representative of the mortgagor to redeem. But whether this can be done in this court, with the very limited jurisdiction indulged to it, which has any resemblance to the powers of a court of chancery, is at least questionable. If there is any remedy in this jurisdiction, it must be in the form of a bill in equity; which it may be the demandant and the representatives of Benjamin Bird are

[1] 10 Mass. 364.

competent to maintain for the redemption of the first mortgage. The representatives of Bird are competent to redeem the two mortgages, and the claim of dower by the widow might be adjusted by some equitable arrangement, that would do justice between her and the creditors or heirs at law of the husband. But she has at present no remedy at law against the demandant."

71. In the case of Bolton *v.* Ballard,[1] Parker, C. J., says: — "But for the circumstances," &c., "this state of facts would present the general question, whether a widow can have dower of an equity only; a question which has not received a direct judicial decision with us. There are strong reasons in favor of dower under such circumstances; and by the common law, which in this regard is founded in public policy, as well as upon a due regard to the situation of widows, dower is a favored estate." After stating the general rule, that as to all but the mortgagee the mortgagor, until foreclosure or possession taken, remains owner of the estate, he proceeds thus: — "There seems to be no reason then why the wife should not be endowed, so long as her claim will not interfere with the rights of the mortgagee. For the husband was seised in fact, after the execution of the mortgage, against all but him to whom he had thus conveyed; and if it should be for the interest of the wife, as in some cases it may be, to redeem the estate, there can be no good reason why she should not enjoy an estate which, but for an incumbrance which she has removed, would always have been subject to her claim. This right may be enforced in England by the intervention of the court of chancery. And there seems to be no reason why the wife here should not be placed in a situation which may enable her to redeem or to hold the estate, if it should otherwise be redeemed; as it may be by the mortgagee's pursuing his remedy for his debt against the personal estate of the husband after his decease. It is enough that the law will not permit the wife to affect the contract of the husband, made with the mortgagee before the

[1] 13 Mass. 229, 230.

marriage. No other person has any lawful interest in excluding her from the customary right of the wife in the estate of her husband."

72. In the above case the facts were, that E. Bolton mortgaged the premises to Howard to secure a bond of the same date, and afterwards died, leaving G. Bolton his heir, who conveyed to S. Bolton, December 19, 1796. On the same day S. Bolton conveyed to the tenant, he agreeing to pay Howard the balance due on the bond, portions of it having been paid, and the rest of the consideration to S. Bolton, both which were done, and the bond discharged. The tenant immediately entered, and remained in possession to the date of the writ. On the 20th of December, 1802, Howard, by deed dated December 19, 1796, and indorsed on the mortgage, released to the tenant all his right in the land, for a consideration named. The plaintiff, being the widow of S. Bolton, brings an action against the tenant for her dower. Upon these facts, the Court, after making the general remarks above quoted, proceed to decide, that, whether a wife is dowable of an equity or not, the demandant must prevail in this case, because the bargain between S. Bolton and the tenant, that the latter should pay off the mortgage, the appropriation of enough of the consideration for that purpose, and the payment of the money and discharge of the bond on the same day with the deed to the tenant, were equivalent in effect to a payment of the mortgage by S. Bolton the day before he conveyed to the tenant, in which case he would have been restored to an indefeasible estate in fee, and his seisin would have been perfect. "It is not stated, whether the payment or the delivery of the deed had precedence in point of time. But, to execute the real intention of the parties, it must be supposed that the incumbrance was first removed. Then S. Bolton was seised, so as to vest a right of dower in his wife; and, although this may be considered in one view as a seisin for an instant; yet it is to be taken in connection with the former seisin, which, although affected by the rights of the mortgagee, was always in force against

every other person. And when those rights ceased to exist, the estate was as if it had never been incumbered." The Court then proceed to notice the distinctions between this and other previous cases on the same subject. In Popkin *v.* Bumstead, the widow had released her dower, and the husband had done nothing towards redeeming. In Holbrook *v.* Finney, (4 Mass. 566,) the husband was never seised, having taken a deed and given back a mortgage simultaneously.

73. In another case decided by the same Court,[1] a wife joined her husband in a mortgage and released her dower. After his death, she represented the fact to the Probate Court, and in consideration thereof prayed for a meet sum from the personal estate; and an allowance was made her of one thousand dollars. Subsequently the administrator discharged the mortgage. Held, the widow was entitled to her dower. (*x*)

74. The widow of a grantee of an equity of redemption, conveyed to him during the coverture, and by him conveyed to the mortgagee, without her release of dower therein, is

[1] Hildreth *v.* Jones, 13 Mass. 525.

(*x*) Mortgage, with release of dower. Upon a sale of the equity of redemption on execution, the defendant purchased it, and, having paid the mortgage debt, claimed an assignment of the mortgage. The mortgagee said, an assignment would be unnecessary, but discharged the mortgage on the records. Held, the mortgage was extinguished, and the widow entitled to dower, and to maintain a bill in equity for redemption. Eaton *v.* Simonds, 14 Pick. 98.

The execution purchaser, under the same circumstances, having taken immediate possession, obtained an assignment of the mortgage, and remained in possession more than three years after the assignment; the husband died, but no notice was given to the wife, that the purchaser was in possession for condition broken. Held, the wife might redeem, in order to obtain dower. Ibid.

Held, also, that the defendant was not chargeable with the rents and profits received during the husband's life, but must account for those received since his death. So also with the allowance for repairs. Living the husband, he occupied under his title as purchaser, afterwards, as mortgagee. Ibid.

entitled to dower in such equity, as against the mortgagee and his assignee of the mortgage and the equity. And possession taken by the mortgagee, after the conveyance of the equity to him, for the purpose of foreclosing, and the continuance of that possession by his assignee, for the same purpose, will not bar such widow's dower, though she knows that possession is taken and continued, unless notice is given to her, after her husband's death, and three years before she claims her dower, that possession was taken and held for the purpose of foreclosure.[1]

75. Bill in equity to redeem two mortgages, made by one deceased, in both which mortgages, one of the defendants, the wife of the mortgagor, released her dower. After the mortgagor's death, the mortgages were assigned to the other defendant. The plaintiff was lawful owner of the equities of redemption, and admitted to have the right of redeeming, upon payment of the mortgage debts. He also claimed under an assignment of the mortgages, made to the heir of the mortgagor. Dower had been set off to the widow, as if no mortgage had been made, and the defendants denied the plaintiff's right to an assignment of the mortgages, upon the ground that such assignment of dower was made at a time when, from the long delay of the plaintiff to redeem the mortgages, they had no reason to suppose that he ever intended so to do. Held, such delay did not affect the plaintiff's right to redeem, which could be defeated only by a foreclosure of the mortgages; that the assignment of dower by the assignee of the mortgages was not binding on the plaintiff, the widow having no right of dower without contributing her proportion towards the redemption: and that, if she declined thus to contribute, the plaintiff might redeem, on payment of the two mortgages, deducting the rents and profits, and have an assignment of the mortgages.[2]

76. A writ of entry to foreclose a mortgage may be maintained, and a conditional judgment rendered, against a widow in possession, under an assignment of dower by the

[1] Lund *v.* Woods, 11 Met. 566.

[2] Niles *v.* Nye, 13 Met. 135.

Probate Court; though such assignment is void. Although, in general, a widow has a mere right, but no seisin, till assignment of dower; by statute she may occupy, with the consent of the heirs, before such assignment. Hence the defendant in this case is not a mere stranger. She holds under and in right of her husband, and may at her election have a conditional judgment.[1]

77. In the case of three mortgages, the wife of the mortgagor having released her dower in the second, and the third mortgagee paid and discharged the other mortgages without the knowledge or consent of the mortgagor; held, the widow of the mortgagor might claim dower against the third mortgagee. The Court say, — the tenant (claiming under the third mortgagee) "took his conveyance subject to" (the second mortgage), "and it may be presumed that the consideration paid was less by the amount of that incumbrance. He paid off the incumbrance to clear his own estate, and took a discharge. The fact that the tenant did not take an assignment, leads to the conclusion, that he was to pay the mortgage as part of the purchase-money."[2]

78. In Maine, the following cases upon this subject have occurred.

79. A. conveyed to B., and B. gave back a mortgage to secure the consideration. Subsequently A. became indebted to C. on a note for an amount less than the mortgage, and, by an agreement between all the parties, at the same time, the mortgage was discharged by A., upon his receiving his note to C., and the balance in money; and B. mortgaged to C. to secure the amount of the note. Held, the widow of B., who was his wife when all these conveyances were made, was entitled to dower as against C.[3] So a widow is not barred of her dower against a mortgagee who has foreclosed, she not having joined in the mortgage, by a release of dower to the purchaser of the equity.[4]

[1] Raynham *v.* Wilmarth, 13 Met. 414.

[2] Wedge *v.* Moore, 6 Cush. 8, 10.

[3] Gage *v.* Ward, 25 Maine, 101.

[4] Littlefield *v.* Crocker, 30 Maine, 192.

80. In New Hampshire, a widow has dower, in a right in equity to redeem, against all persons, except mortgagees and those claiming under them; against whom she cannot be endowed, except by payment of the mortgage.[1] Nor can she claim dower against any other person, who, having an interest in the redemption, has in fact redeemed, except by payment of a contribution.[2] (*y*) But, if the administrator redeem with assets of the estate, she is let in to dower without contribution.[3] And in case of a mortgage during coverture, the wife relinquishing dower, on payment of the notes secured by the mortgage, out of the estate of the mortgagor, by the administrator; the wife is entitled to dower.[4]

81. It has been held in Pennsylvania,[5] that a mortgage made without consideration, and for the purpose of depriving the wife of the mortgagor of her dower, is void as to the widow and creditors, though binding upon the administrator. A Court of Chancery, in such case, will enjoin the mortgagee from proceeding to a judgment, and a sale of the whole premises, but will authorize a sale, subject to the claim of dower. Upon a *scire facias* by the mortgagee against the widow to foreclose, the Court will admit the widow to defend; and, if there is a *bonâ fide* debt, there shall be a verdict and judgment, giving to the mortgagee a lien on the whole interest as to the real debt, and for the whole amount, subject to the widow's thirds; or, if the mortgage was fraudulently given, without consideration, and for the purpose of defeating the wife, a verdict and judgment for the plaintiff, subject to the widow's dower. But the same principle does not apply to the provision made for the widow in that State by the intestate acts, in lieu of

[1] Rossiter *v.* Cossit, 15 N. H. 38.
[2] Ibid.
[3] Ibid.
[4] Mathewson *v.* Smith, 1 Angell, 22.
[5] Killinger *v.* Reidenhauer, 6 S. & R. 531.

(*y*) In Clough *v.* Elliott, 3 Fost. 182, it is held, that, if land subject to a charge is devised, the widow of the devisee cannot have dower, without contributing her proportion of the charge.

dower. This is a *contingent* right, with none of the common-law privileges of dower, and subject to be defeated by the acts of the husband. Therefore, in the case supposed, the mortgage cannot be *wholly* avoided, upon the ground that the widow *might* have been entitled to the whole estate, if the intestate died without kindred.

82. It is held in Ohio, that, where land is mortgaged by the husband, the condition broken before marriage, and the equity of redemption released by him during the coverture, his widow is not entitled to dower.[1]

83. With regard to the *terms* upon which the widow will be allowed to claim her dower, and more especially upon the question, whether she must pay the whole mortgage debt, or only her proportional share; the following remarks and decisions have been made. The general principle would seem to be, though not without some qualifications, that, like all other persons claiming a partial or qualified interest in mortgaged property, a dowress, in order to redeem, must pay the whole debt, with the right to retain the whole estate, till equitably reimbursed by others, jointly interested. Thus it is held in Massachusetts, that where the purchaser of an equity of redemption pays the mortgage debt and takes an assignment of the mortgage, the mortgagor's widow cannot redeem without paying the whole mortgage debt.[2] It is said[3] (per Wilde, J.): — "Where several are interested in an equity of redemption, and one only is willing to redeem, he must pay the whole mortgage debt; and the others interested in the equity, who refuse to redeem, are not compellable to contribute; for it would be unreasonable to compel a party to redeem, when perhaps it might be for his benefit to suffer the mortgage to be foreclosed. The mortgagee, however, is not to be entangled with any question which may arise between the owners of the equity in relation to contribution, but has the right to insist on an entire redemption. If, therefore, several estates are mortgaged by one

[1] Rands *v.* Kendall, 15 Ohio, 671.
[2] Gibson *v.* Crehore, 5 Pick. 146.
[3] Ibid. 152.

mortgage, and the mortgagor afterwards conveys the estates separately to different persons, although each owner of the separate estates may redeem; yet it can only be allowed by payment of the whole mortgage debt. And the party so redeeming will be entitled to hold over the whole estate mortgaged, until he shall be reimbursed what he has been thus compelled to pay beyond his due proportion. He is considered as assignee of the mortgage, and stands, after such redemption, in the place of the mortgagee, in relation to the other owners of the equity. So, if there be tenant for life and remainder-man of an equity, either may redeem, but not without paying the whole mortgage. In like manner, a dowress or jointress of lands mortgaged may redeem, she paying the mortgage debt, and may hold over, if the heir refuses to contribute, until she and her executor shall be repaid with interest." So in case of a writ of dower, by the widow of a mortgagor, against a purchaser of the equity of redemption from the mortgagor's administrator, who sold under a license from the Probate Court; the defendant having paid the mortgage debt, but the plaintiff not contributed or offered to contribute anything towards the discharge of the mortgage; held, the action could not be maintained. The Court say: "This demandant was entitled to her dower in the equity of redemption." But a widow "can maintain no writ of dower against the mortgagee or his assignees, until she has redeemed the land, by paying the amount due on the mortgage. Nor against any person, who, having the right to redeem the land, has paid the amount due on the mortgage, until she has contributed her due proportion of the money thus paid, according to her interest."[1] And in a late case in Massachusetts,[2] Shaw, C. J., thus states the rules of law upon this subject. "The demandant, having thus joined with her husband in a mortgage to secure the payment of a debt, has barred herself of her right of dower, if necessary to give effect to her act of release; that

[1] Cass *v.* Martin, 6 N. H. 25, 26.

[2] Brown *v.* Lapham, 3 Cush. 553, 554.

is, so far as shall be necessary to secure the payment of the debt, for which the estate was thus hypothecated. After such an alienation, she can only avoid the effect of her deed and be restored to her right of dower, in one of two modes. "1. When the debt shall be paid and satisfied by the husband or by some person acting in his behalf, and in his right, so that the mortgage is extinguished, by means of which the whole object and purpose of giving it is accomplished. 2. By a redemption by payment of the debt herself. The latter can only be sought by a process in equity, and tendering the payment of the mortgage debt." "In order to such payment, so as to extinguish the mortgage, the debt must be paid by the husband, or out of the husband's funds, or by some person, as personal representative, assignee, or person standing in some other relation, which in legal effect makes him mortgagor and debtor, and one whose duty it is to pay and discharge the mortgage debt."

84. In the same State, however, it had been previously held, that a widow, who has released her dower in a mortgage deed, may redeem upon paying her due proportion of the mortgage debt; that the value of her life-estate is to be adjusted, by taking into consideration her age and the state of her health, and by ascertaining the value of the residue of the estate, including the reversion of her third part; and her proportion of the debt will be according to the proportional value of her estate, and that of the defendant.[1] (z)

[1] Van Vronker *v.* Eastman, 7 Met. 157.

(z) This case turned upon other points, and it does not appear to have been claimed for the defendant, that the plaintiff was bound to pay the *whole* mortgage debt. McCabe *v.* Bellows, 7 Gray, 149, per Thomas, J. Judge Thomas further remarks: "In Gibson *v.* Crehore, the decree was for the widow to redeem by paying her proportional part; but this was upon the election of the mortgagees, the Court having expressly decided that she could redeem on no other terms but by the payment of the whole debt. 5 Pick. 153." And that the case of Van Vronker *v.* Eastman is not, when carefully examined, inconsistent with Gibson *v.* Crehore and Brown *v.* Lap-

85. In Massachusetts, Judge Wilde remarks,[1] that the widow may redeem without any previous assignment of

[1] Gibson *v.* Crehore, 5 Pick. 146, 149, 150.

---

ham. Ibid. See Palmes *v.* Danby, Prec. Chanc. 137; Tillinghast *v.* Fry, 1 Ang. (R. I.) 53.

The only intelligible distinction would seem to be, that, where redemption is sought from the mortgagee, the whole debt must be paid; but where some other party, claiming under the mortgagor, redeems, then, in order to redeem from such party, the widow shall pay only her share. McCabe *v.* Bellows, 7 Gray, 148. In a case in Massachusetts, it is said by Judge Wilde: — "In Swaine *v.* Perine, 5 Johns. 482, it was held, that, if the heirs pay a mortgage, the wife shall contribute as to the sum paid by them; but as far as the husband had reduced the mortgage, it was a reduction for her benefit as well as his. And the same rule applies to a payment by the husband's assignee during his life." Eaton *v.* Simonds, 14 Pick. 108." (Of this case — Eaton *v.* Simonds — it is remarked, [per Thomas, J., Newton *v.* Cook, 4 Gray, 50,] it "was decided before the passage of the statutes now in force, and could not have been decided as it was, under Rev. Sts. c. 60, § 2.") The Revised Statutes of Massachusetts, ch. 60, § 2, provide, that if, upon a mortgage made by the husband, the wife release her dower, or if the husband be seised of land subject to any mortgage which is valid against the wife; she shall have dower as against all except the mortgagee, and those claiming under him, provided, that if the heir or other person claiming under the husband shall redeem the mortgage, the widow shall either repay such part of the money paid by him, as shall be equal to the proportion which her interest bears to the whole value of the premises, or she shall, at her election, be entitled to dower only according to the value of the estate, after deducting the money so paid for the redemption thereof.

When a person claiming under the husband redeems a mortgage which was valid and effectual against the wife, she may, under Rev. Sts. c. 60, § 2, by action at law, have her dower assigned to her, first deducting from the value of the land the amount paid for the redemption of the mortgage. And a general demand of dower is sufficient to support such an action. Newton *v.* Cook, 4 Gray, 46.

In Vermont, the Probate Court have exclusive jurisdiction of the assignment of dower; and, if the dowress claim to have a special rule of apportionment, can alone establish such rule in her favor. But, if the Probate Court assign dower, generally, in an equity of redemption, without determining the proportion which the widow shall pay towards the incumbrance, it is equivalent to saying, that it shall be in proportion to her estate; and the Court of Chancery have jurisdiction, upon a bill brought by the dowress for that purpose, to determine the proportion upon the general rule

dower, because such assignment does not affect her equitable right of redemption, and she has no right to demand such assignment as against the mortgagee, before redeeming, nor is an assignment by the heirs necessary, because she could not redeem a part without redeeming the whole. And the Supreme Court has full jurisdiction of the claim, under the statute which provides a bill in equity for the mortgagor "or other person claiming as aforesaid," and that judgment may be rendered agreeably to equity and good conscience; and also the statute relating to trusts and the settlement of estates. (*a*)

---

of equity in such cases, except so far as the parties may have varied that rule, by an agreement executed at the time. Danforth *v.* Smith, 23 Verm. 247.

The mere fact, that the estate has been purchased subject to the incumbrance and to dower, is not sufficient to raise any special rule of apportionment. Ibid.

The dowress may bring a bill in chancery, for apportionment, whenever the incumbrance becomes due, without first paying it. Ibid. The general rule of equity is, that all the estates concerned, whether defined by quantity of interest and duration, or by extent of territory, shall contribute towards the incumbrance, according to their relative value when the contribution becomes obligatory, which is, when the debt falls due. Ibid.

According to this rule, when a widow is endowed in an equity of redemption, one third of the incumbrance should be placed upon the land covered by the dower, and the remaining two thirds upon the residue of the land covered by the incumbrance. Danforth *v.* Smith, 23 Verm. 247.

But it is competent for the dowress, the mortgagee, and the purchaser of the equity of redemption, subject to the incumbrance and the dower, to agree upon a different mode of apportionment; and if they agree, although by parol, that all of the incumbrance, except a certain part, should be paid from that portion of the mortgaged premises not covered by the dower, this agreement, when executed, will be irrevocable, and the Court of Chancery will have regard to it, in apportioning the residue of the incumbrance between the dowress and the owner of the reversion. Ibid.

In apportioning an incumbrance between a dowress and the owner of the reversion, it is not competent for the Court of Chancery to determine any sum, which shall be expended by the dowress, each year, for repairs. Ibid.

There is no rule, in Vermont, requiring the dowress of an equity of redemption to keep down the interest upon the incumbrance. Ibid.

(*a*) The plaintiff, the widow of a mortgagor, who had joined in the mort-

86. The Revised Statutes of Massachusetts, c. 60, § 3, provide, that when a widow is entitled to dower, in lands of

---

gage, brings a bill in equity, against an assignee of the mortgage, and an assignee of the equity of redemption, praying to redeem, and also an assignment of dower. It was held, that the latter prayer was simply void, and therefore did not render the bill multifarious. Also, that the bill to redeem was properly brought against both defendants, inasmuch as a suitable decree would require an account between the plaintiff and the assignee of the equity of redemption. McCabe *v.* Bellows, 1 Allen, 269.

The following miscellaneous cases have been decided upon this subject. Mortgage of two parcels of land, in which there was a right of dower. The mortgagor afterwards conveyed all his interest in one of them, A., and, in consideration of the wife's releasing her dower, conveyed to her a life-estate in the other parcel, B., and she entered and took the profits. The plaintiff purchased from the mortgagor the lot B. One of the defendants, having purchased lot A., takes an assignment of the mortgage, and enters for foreclosure. The plaintiff brings a bill to redeem against the assignee of the mortgage and the wife. Held, the wife was not bound to contribute towards the redemption, nor to account for the profits of the second parcel, the lease for life having been made to her in lieu of her right of dower in both parcels. Also, that as the other defendant could not have compelled the wife to pay over the rents and profits of lot B., without giving her a right of dower in both lots; he was not bound to account for them, and that the plaintiff had no equitable claim to them, as he purchased after the lease for life, and consequently at a reduced price on that account. Also, that the assignee of the mortgage was bound to account for the rents, &c., of lot A. from the time of his entry to foreclose. Also, that the plaintiff, upon paying the whole mortgage debt, deducting the rents and profits of lot A., should hold the whole, except the part leased, till reimbursed the amount paid by him over his share of the mortgage debt. Brooks *v.* Harwood, 8 Pick. 497.

The owner of land made a mortgage of it, having previously made a written contract for the erection of a building thereon, which contract was recorded, for the purpose of giving the builder a lien upon the land, under the statute. The wife of the mortgagor joined in the mortgage, and the mortgagee had no notice of the contract above mentioned. The builder caused the property to be sold under the lien, and an assignee of the mortgage bought his interest. The mortgagor having died, his widow brings a bill in equity against the assignee to redeem. Held, she might redeem without paying any part of the sum thus paid by the assignee. Van Vronker *v.* Eastman, 7 Met. 157.

A mortgagor devised the estate to his son. The son died, leaving a widow.

which her husband *died seised*, and her right to dower is not disputed by the heir or devisees, it may be assigned to her by

---

The executor of the father sold the estate, became himself the purchaser, and redeemed the mortgage, paying one half of it with assets in his hands as executor, as ordered by the will, and the rest with his own funds. The widow and heirs of the son affirmed the sale. Held, the widow should have, as dower, the interest for her life of one third of the price of the equity, and one third of the sum paid from the estate by the executor to redeem. Jennison *v.* Hapgood, 14 Pick. 345.

The purchaser of an equity of redemption, from the mortgagor's administrator, gave a bond to the latter to pay the mortgage debt, and afterwards paid it, taking an assignment of the mortgage. The widow of the mortgagor brings a bill in equity against the assignee to redeem. Held, the bond could not be set up by the plaintiff, she not being a party to it, either by way of estoppel or otherwise. It was a personal obligation of indemnity, to secure the personal estate against any claim for the mortgage debt. Gibson *v.* Crehore, 5 Pick. 146.

Where one of several mortgagees was to have possession of part of the premises for life, and a pecuniary provision, under certain circumstances, not exceeding a particular sum; held, a tender by the widow to an assignee of the husband of a sum of money, as an indemnity against such provision, did not discharge the mortgage, or give her a claim to dower. The husband or his assignee would be entitled to possession, and the widow to dower, until a claim made for such provision. Bullard *v.* Bowers, 10 N. H. 500.

The administrator of a mortgagee, having entered for breach of condition, allowed the mortgagor's widow to remain in possession of part of the land. Held, he should account to a purchaser of the equity of redemption for the profits of the whole farm, and after the lapse of a reasonable time to eject her by legal process. Thayer *v.* Richards, 19 Pick. 398.

A husband, who, before his marriage, had mortgaged land to a guardian, for the benefit of his wards, afterwards became insolvent; and his assignee sold the land, the purchaser made a mortgage to the wards to secure a like amount, and the guardian discharged his mortgage upon the record, pursuant to a verbal agreement that the mortgage to the wards should be substituted for that to the guardian; the purchaser afterwards sold the land, and his grantee redeemed the mortgage, before the husband's death. Held, that, under Rev. Sts. c. 60, § 2, the widow was entitled to dower in the equity of redemption only. Newton *v.* Cook, 4 Gray, 46.

In New Hampshire, a widow is entitled to dower in an equity of redemption, against all persons except the mortgagee and persons claiming under him. Hastings *v.* Stevens, 9 Fost. 564. As against the mortgagee, she can-

the Probate Court. Under this statute it has been held, that, where a mortgagor is in possession at his death, he is sufficiently seised, to entitle his widow to an assignment of dower, upon petition to the Probate Court.[1] In this case, a widow petitioned the Probate Court for an assignment of dower in real estate of the husband. It appeared that he had conveyed the estate in fee and in mortgage, she joining in the deed and relinquishing her dower. Also, that the administrator was the mortgagee, and did not

[1] Henry's case, 4 Cush. 257.

---

not be endowed, except upon payment of the mortgage. As against one having an interest to redeem, who in fact redeems, only upon contribution of a fair proportion of the incumbrance, according to the value of her dower interest. Otherwise, if an administrator, with the assets, pay off and discharge the mortgage. Where an administrator sold a mortgaged estate at auction, and conveyed it with a warranty against all claims, by, from, or under the intestate or himself, "but against no other persons;" and afterwards paid the mortgage; and the mortgagee executed a receipt upon the mortgage for the amount due upon it, "in full discharge thereof:" held, a discharge of the mortgage, which let the widow in to her dower. So, notwithstanding a public declaration, at the sale by the administrator, that he had paid a part of the debt to the mortgagee, and that he would "pay," or "lift," or "raise," the mortgage for the benefit of the purchaser. Hastings *v.* Stevens, 9 Fost. 564. Where a husband and wife executed a mortgage, to secure a note, and the husband died, the note still remaining unpaid, and one A. purchased the note and mortgage, and took an assignment of them, and afterwards purchased the equity of redemption, at a public sale of it by the administrator; held, upon payment of her proportion of the debt, the widow was entitled to be endowed. Woods *v.* Wallace, 10 Fost. 384.

If the widow of the mortgagor, while in possession of the mortgaged premises, before dower is assigned to her, conveys by deed to the mortgagee; if her deed is effective for any purpose as against the heirs, her alienee certainly does not thereby acquire more than the right to retain one third of the rents and profits. Hunt *v.* Acre, 28 Ala. 580.

A. and B. were tenants in common of mortgaged land. A. purchased B.'s share and paid off the mortgage. B. having died, held, B.'s widow was entitled to dower in his half of the land, and might recover it by an action at law, deducting half the amount of the mortgage at the time of the discharge. Pynchon *v.* Laster, 6 Gray, 314.

object to an assignment of dower in the whole estate, the residue being of sufficient value to pay the mortgage debt; and that no person objected, as heir or devisee, to the assignment. Held, the petition should be granted. The Court say: — "The appellant is entitled to dower, as against every person except the mortgagee and those claiming under him. It is so expressly provided by the Rev. Sts. c. 60, § 2, and she may at her election have her dower assigned to her according to the value of the estate, after deducting the mortgage debt; so it may be assigned to her in the whole estate 'provided that if the heir or other person claiming under the husband shall redeem the mortgage, she shall repay such part of the money paid by him, as shall be equal to the proportion, which her interest in the mortgaged premises bears to the whole value thereof.' Whether she would be liable to pay such proportion, should the mortgage be foreclosed, may be a question, which, however, is not raised on this appeal; whatever may be the appellant's future liabilities, she has the right to have her dower assigned to her in the whole estate, the mortgagee not objecting. And this assignment the Judge of Probate had a right to make. By the third section of the same chapter it is enacted, that 'when a widow is entitled to dower, in lands of which her husband died seised, and her right of dower is not disputed by the heirs or devisees, it may be assigned to her, in whatever counties the lands may lie, by the Judge of Probate for the county in which the estate of the husband is settled.' In the present case, the appellant's right to dower was disputed by no one; and her husband died seised of the estate in which dower is claimed, notwithstanding the mortgage. The title of a mortgagor of real estate is peculiar, for although by the mortgage deed a conditional title to the whole estate passes, and, as between the mortgagor and mortgagee, the latter becomes seised of the legal estate, yet, as the mortgage is intended only as security for a debt, the mortgage, as between the mortgagor and all other persons, is considered only as a pledge and an incumbrance, the mortgagor still remaining the owner of the

estate. Therefore, the husband did die seised of the mortgaged premises." (*b*)

(*b*) Somewhat analogous to dower is the wife's right of *homestead*, now provided by statute in many of the States. Upon this subject it is held, that, where the husband mortgages property occupied by himself and his wife as a homestead, and previously conveyed in trust for her; she has an equitable interest, which entitles her to redeem. Whitcomb *v.* Sutherland, 18 Ill. 578. In California, a suit to set up and foreclose a mortgage on the homestead is not a "claim" against the estate of the mortgagor, as in no event does that estate hold the homestead, and therefore the suit may be brought in the District Court, and the administrator may be joined, to litigate the amount of the indebtedness. Carr *v.* Caldwell, 10 Cal. 380.

CHAPTER XVI.

EQUITY OF REDEMPTION. TERMS OF REDEMPTION. ACCOUNT OF A MORTGAGEE IN POSSESSION. HIS LIABILITY FOR RENTS, AND CLAIM FOR EXPENDITURES.

1. The mortgagee is liable to account, as a *steward* or *bailiff*; extent of his liability.
12. Mode of computing *interest*; whether the mortgagee is chargeable with interest; annual *rests*.
18. What provisions in a mortgage will bind the party to pay interest.
20. Interest, in case of a particular tenant and reversioner.
22. For what repairs and other expenditures the mortgagee shall be allowed.
34. Sale of a part of the mortgaged property; proceeds to be accounted for.
35. Accounting for rents, &c., to subsequent mortgagees, creditors, assignees, &c.
45. *Receivers.*
52. Parties in case of a decree to account for rents, &c.

1. With regard to the *terms*, upon which redemption of a mortgage may be had, or the mutual settlement and adjustment between the mortgagee and mortgagor; it is held, that a mortgagee in possession is the *steward* or *bailiff* of the mortgagor, without a salary,[1] and, as such, accountable to him or his assignee,[2] or a subsequent mortgagee,[3] (*a*) for the profits.[4] And, if he refuse to account, he is liable to "every

[1] Cholmondeley *v.* Clinton, 2 Jac. & W. 179.
[2] Ruckman *v.* Astor, 9 Paige, 517.
[3] Moore *v.* Degraw, 1 Halst. Ch. 346.
[4] Anthony *v.* Rogers, 20 Mis. 381.

(*a*) It is held, that one in possession of mortgaged premises, under a title subject to the mortgage, must account to the *mortgagee* for the rents and profits. Latimer *v.* Moore, 4 McL. 110. A decree of foreclosure was opened after enrolment, on application and motion of a subsequent mortgagee, in order to charge the plaintiff with a reasonable rent, the prior mortgage having been assigned to the plaintiff when he was tenant under the mortgagor, and he having filed the bill to foreclose the prior mortgage, and in the mean time retained possession. Moore *v.* Degraw, 1 Halst. Ch. 346.

A mortgagee may be in possession as *agent* of the mortgagor; and must then account, as in other cases. Brock *v.* Lewis, 7 Rich. Eq. 77.

presumption against him that the evidence will warrant."[1] The rents and profits are said to be in equity incidents *de jure* to the ownership of the equity of redemption.[2] Parol evidence is not admissible, that the mortgagee was not to account.[3] And it is said, "A mortgagee, entering into possession, and taking the profits, must be deemed to take them in his character as mortgagee. If in any sense he can be said to take them as *agent*, it must be as agent-mortgagee. Before forfeiture, he may properly be deemed in some sort an agent. (*b*) But after forfeiture his possession is under his title; and if he then takes the profits, he must be deemed to take them as mortgagee, and not otherwise, unless there be the most plenary and irresistible proof, that he has disclaimed that character, and taken them to account, and has accounted therefor, as a stranger agent."[4]

2. In general, however, the mortgagee is liable only for the actual receipts, if they can be ascertained, unless he is guilty of fraud, of some gross wrong or neglect, or wilful default, as by the rejection of a good tenant or the admission of an insufficient or notoriously insolvent one.[5] (See § 8.) In which case he will be liable, deducting the time requisite for expel-

[1] Reitenbaugh *v.* Ludwick, 31 Penn. 131.

[2] Gordon *v.* Lewis, 2 Sumn. 143. See ch. 22, § 48, *et seq.*

[3] Davis *v.* Lagarter, 20 Ala. 561; Saunders *v.* Frost, 5 Pick. 259.

[4] Dexter *v.* Arnold, 1 Sumn. 116, 117.

[5] See Beare *v.* Prior, 6 Beav. 183; Hogan *v.* Stone, 1 Ala. N. S. 496; Benham *v.* Rowe, 2 Cal. 387.

(*b*) The mortgagee must account for the rents and profits, where it was agreed that he should receive them till the debt became due, and then reconvey. Cross *v.* Hepner, 7 Ind. 359. Entry by a mortgagee, *before breach of condition*, is regarded as a harsh proceeding, contrary to the intention of the parties, and unwarranted by any default of the mortgagor; and therefore the mortgagee will be held to a very strict account of the rents and profits. He cannot, after discharge of the mortgage, recover from the mortgagor for repairs not necessary to preserve the estate. Ruby *v.* Abyssinian, &c., 3 Shepl. 306. See M'Carron *v.* Cassidy, 18 Ark. 34. In Maine and Massachusetts, the mortgagee, in such case, shall account for the *clear rents and profits*. Mass. Rev. Sts. 635; Maine Rev. Sts. 553.

ling such tenant and obtaining another.[1] Not for the rent of an *absconding* tenant, unless guilty of negligence.[2] His liability is that of a *provident* owner.[3] If the amount of the rents received cannot be fixed, he is liable for a fair *occupation rent*.[4] The mortgagee of a farm has no right to let it lie untilled, because the house on it, or the house and farm together, were not rented; nor to let it go to waste. But he is bound to keep it in good ordinary repair, and, in case of a farm, for good ordinary husbandry.[5]

3. The rule has also been stated in this form. If the mortgagee himself occupies, he is accountable for the *utmost value* (*c*) the land would have produced with ordinary care, exclusive of taxes and repairs; but, if he enters into receipt of the rents, only after the rate of the rent reserved.[6] If the mortgagee occupy himself, he cannot be allowed, for his care of the estate, a commission on the rent for which he is required to account.[7] So it has been held, that no allowance is to be made to a mortgagee for his management of the estate, beyond legal interest, notwithstanding an agreement for that purpose.[8] So, where a mortgage provided, that, in order to secure the regular payment of the debt, the mortgagee should be in receipt of the rents, and have, as receiver, £60 a year for his trouble, and, after retaining this amount

[1] Miller *v.* Lincoln, 6 Gray, 556.
[2] Saunders *v.* Frost, 5 Pick. 259.
[3] Shaeffer *v.* Chambers, 2 Halst. Ch. 548; M'Connell *v.* Holobush, 11 Ibid. 61.
[4] Gordon *v.* Lewis, 2 Sumn. 144. See Trulock *v.* Robey, 15 Sim. 265.
[5] Shaeffer *v.* Chambers, 2 Halst. Ch. 548.
[6] 2 Greenl. Cruise, 113, 114, n. See Holabird *v.* Burr, 17 Conn. 556; Kellogg *v.* Rockwell, 19 Ibid. 446.
[7] Eaton *v.* Simonds, 14 Pick. 98.
[8] Breckenridge *v.* Brooks, 2 A. K. Marsh. 335; French *v.* Baron, 2 Atk. 120; Bonithon *v.* Hockmore, 1 Vern. 316; acc. Clark *v.* Robbins, 6 Dana, 350; Benham *v.* Rowe, 2 Cal. 387.

(*c*) Elsewhere termed a *reasonable* rent. Moore *v.* Degraw, 1 Halst. Ch. 346. A mortgagee of *slaves* in possession is bound to use reasonable diligence in keeping them usefully employed, so as not only to pay their necessary expenses, but also obtain reasonable compensation for their labor. And this, though he treated them humanely, provided for their wants, and made them comfortable, or managed them as the mortgagor had done. Bennett *v.* Butterworth, 12 How. 367.

with the interest, should pay the balance to the mortgagor; it was held, that he was liable to a *qui tam* action for usury.[1]

4. But, on the other hand, it is said, the mortgagee may charge for the collection of rents; or may be allowed a commission for his services in receiving the rents. So he may be allowed the cost of obtaining speedy possession of the estate.[2] So, also, he may agree with the mortgagor for a receiver, to be paid by the latter. In Massachusetts, the usual amount is five per cent. But there is no fixed rule upon the subject, and he is not restricted to this percentage.[3] And while it is said to be a general rule, founded on the jealousy which courts entertain at the interference of the mortgagee with the estate, that, if he be in possession, and receive the rents, he shall be allowed nothing for his trouble; yet, if the estate lie at such a distance from the place of his residence, as that he must necessarily have employed a bailiff, if the property had been his own, he will be allowed such sums as he actually paid to a bailiff.[4] Also, that, in order to redeem, the mortgagor will be required to pay *all that is equitably due* as incident to the debt;[5] or *all debts forming a charge* upon the land;[6] but the mortgagee *cannot make a profit* out of the mortgage.[7]

5. A mortgagee is not bound to pay over rents, &c., while any part of the debt, charged upon the portion of the estate belonging to the party who claims them, remains unpaid.[8] But he must apply the rents received by him to the mortgage debt, principal as well as interest, not to other claims. They are to be applied, as they accrue, to keep down the interest.[9] And a mortgagee must account, as such, for rents received by him, although an agreement was made between him and the mortgagor to apply them to an independent

[1] Scott *v.* Brest, 2 T. R. 238.
[2] Waterman *v.* Curtis, 26 Conn. 241.
[3] Coote, 404; Adams *v.* Brown, Law Rep. May, 1851, p. 38; 7 Cush. 220; 26 Conn. 241.
[4] 1 Pow. 295, *b.* n., Gilbert *v.* Dyneley, 3 M. & G. 12.
[5] Bank, &c. *v.* Rose, 1 Strobh. Eq. 257. See Tennent *v.* Dewees, 7 Barr, 305.
[6] Tharp *v.* Feltz, 6 B. Mon. 6; Coote, 458.
[7] Walton *v.* Withington, 9 Miss. 549.
[8] Bell *v.* Mayor, &c., 10 Paige, 49.
[9] Walton *v.* Withington, 9 Miss. 549.

claim; if after such agreement the claim became invalid as a lien upon the estate. Thus a mortgagor was indebted to the mortgagee in a building contract, applying to the mortgaged property, which, though duly recorded, had not been enforced, according to law, by a suit within six months. The mortgagee entered for breach of condition, and it was thereupon verbally agreed between the parties, that he should let the estate, and apply the rents to the building contract. Before any rent had been paid or become due, the mortgagor filed a petition under the insolvent law, and subsequently rents were paid to the mortgagee. Upon a bill in equity, filed by the assignee of the mortgagor, against a purchaser of the estate from such assignee, and the mortgagee; held, the rents received by the mortgagee must be considered as received by him in that capacity, and as such accounted for by him; the lien of the contract having come to an end, by the failure to commence a suit thereupon, as provided by law. In regard to the agreement for applying the rents to such contract, the Court say: — "The agreement to appropriate the rents, to be received by the defendants, towards their building contract, could not by its own force bind the estate. So long as he had a disposing power, so long as he himself had a power to receive the rents, that is, before his insolvency, if the defendants had received any such rent and appropriated it, it would have enured by way of payment, and been available. But no rents had been received by them under the agreement. When the debtor became insolvent, legal proceedings were instituted, under which all his property and rights to property passed to his assignee for his general creditors. It vested in his assignee his right in equity of redeeming the house, the reversion, if it was then let, and all the rents which accrued and became payable; but as no rent was then payable, none could be appropriated under the agreement, because the disposing power of the debtor over it was then gone."[1] So, after a mortgage of tan vats, an

[1] Hilliard *v.* Allen, 4 Cush. 532, 537.

agreement was made between the parties for tanning, the mortgagor to furnish the vats. He absconded, leaving the mortgagee to finish the tanning of certain leather, and the latter occupied till the tanning was completed; a part of the time under an execution founded upon the mortgage. Held, while the mortgagee occupied under the contract, he might apply the rents and profits to that account; but, after taking possession under the execution, he must account for them as mortgagee.[1]

6. The amount of rents received by the mortgagee is to be made up to the time of the master's report.[2] And, upon a decree of strict foreclosure, where the mortgagee is in possession, if the premises are redeemed within the time allowed by the decree, he must account for the rents and profits subsequent to the decree.[3] (*d*) But a mortgagee in possession, having obtained a decree of foreclosure, is not liable *at law* to the mortgagor for the rents and profits after such decree; nor for those prior to the decree, unless allowed by the master on taking the accounts.[4]

7. If the assignee of a mortgage, contemporaneous with that given to the plaintiff, enter and take the profits, he is liable for them as joint owner. And his intention, or agreement with the mortgagor, is immaterial.[5]

8. A mortgagee in possession, being regarded as a trustee, and accountable, as such, for the rents and profits, will be held responsible for them in case of his assigning the estate

[1] Wood *v.* Felton, 9 Pick. 171.
[2] Holabird *v.* Burr, 17 Conn. 556.
[3] Ruckman *v.* Astor, 9 Paige, 518.
[4] Chapman *v.* Smith, 9 Verm. 153.
[5] Holabird *v.* Burr, 17 Conn. 556.

(*d*) In Ruckman *v.* Astor, 9 Paige, 517, it was held that a purchaser of mortgaged premises, redeemed within the time allowed by the Act of 1837, concerning the sale of real estate under mortgage, cannot retain the rents and profits accruing between the sale and the time of redemption, in addition to the amount of his bid and ten per cent. interest thereon, although the owner of the equity neglected to give the requisite security, to prevent the purchaser from taking possession immediately after confirmation of the report of the sale.

to an insolvent person, without the mortgagor's consent, this being a breach of trust.[1] (See § 2.)

9. Where a mortgagor sold the estate, the purchaser assuming the mortgage, and giving his own notes with a surety, as collateral to the mortgage debt; and suit was brought against the surety, and, his estate being small, the judgment compromised, the purchaser not objecting: held, the mortgagee was liable to account only for so much as he received, but the costs of suit were not deducted.[2]

10. Where, in a bill for redemption, the plaintiff claimed at the hearing some deduction from the debt, but alleged no receipt, and prayed for no account of rents, but only averred that the defendant threatened to receive them, and turned his cattle on the land; held, no deduction should be made on this account.[3]

11. Where a mortgagee, after entering for foreclosure, receives payment of the mortgage debt, without allowing anything for the use of the property, the mortgagor may maintain an action for money had and received against him, but not an action for use and occupation.[4]

12. According to the general rule, that the mortgagee shall get nothing beyond the principal and interest of his debt, it seems he is accountable for interest on the surplus rents over the interest on the mortgage. It is also said, that generally, where the relation of mortgagor and mortgagee is undisputed, if the latter receive the rents after the debt is satisfied, and retain them to his own use, he is liable for interest. But if he retained them under a mistake, supposing the mortgagor's rights to be extinguished, he would not be liable for interest, till after notice of the adverse claim.[5]

13. An agreement was made between mortgagor and mortgagee and a builder, that the builder should rebuild the premises, and receive a lease at a nominal rent, he granting

[1] Coote, 427, 428; Neale *v.* Hagthorp, 3 Bland, 590.
[2] Johnson *v.* Rice, 8 Greenl. 157.
[3] Gree *v.* Lord, 25 Verm. 498.
[4] Wood *v.* Felton, 9 Pick. 171.
[5] Gordon *v.* Lewis, 2 Sumn. 143, 144; Gibson *v.* Crehore, 5 Pick. 146; Powell *v.* Williams, 14 Ala. 476. See Jenkins *v.* Eldredge, 3 Story, 325; Hogan *v.* Stone, 1 Ala. N. S. 496.

an underlease to the mortgagee at a rent of £250, and on payment of £1,000. The buildings were completed, and the mortgagee took possession, but neither the rent nor the £1,000 was paid, but after some years the builder agreed to purchase the mortgagee's lien and balance accounts. Held, the builder should have interest upon the rents, but the account of principal and interest should not be carried beyond the date of the decree; and that interest should not be allowed upon the rents, as against the mortgagor.[1]

14. Where a purchaser of the land mortgaged is made defendant in a suit on the mortgage; in order to redeem, he must pay the sum due in equity, being the principal and interest of the debt, deducting any payments and any sums received as rents and profits. But if he claims that the sum due is uncertain and unliquidated, and that he offered to the plaintiff a certain sum, with condition, that, if he received it, it must be in full satisfaction, and that the money was accepted; in order to show that the sum was thus unliquidated, he may prove the plaintiff to have been in possession, and liable to account for the rents and profits.[2]

15. Compound interest is not to be allowed between mortgagee and mortgagor.[3] But it is held, that, if the mortgagor have allowed compound interest, he cannot revoke such allowance.[4]

16. With regard to the mode of casting interest between mortgagor and mortgagee, it is said that *annual rests* are not to be made by the master, to whom a mortgagee's account is referred, unless he is specifically so ordered by the decree. The general rule is, to charge the mortgagee with interest: 1. Where the mortgage is satisfied, and a considerable balance remains in his hands; 2. Where he refuses to account; 3. Where he has notice of a subsequent mortgage, to pay which he is requested to apply the balance in his hands. In other cases the rule is — to cast the debt and interest, on the

[1] Page *v.* Broom, 4 Russ. 6, 224.
[2] McDaniels *v.* Lapham, 21 Verm. 222.
[3] Kittredge *v.* McLaughlin, 38 Maine, 513. See Dunshee *v.* Parmelee, 19 Verm. 172.
[4] Booker *v.* Gregory, 7 B. Mon 439.

one hand, and the total amount of rents, without interest, on the other hand, and deduct the one from the other.[1] So Judge Story says:[2] — "Courts of equity will not ordinarily require annual rests to be made in settling the accounts; as, for example, they will not require annual rests to be made, where the interest of the mortgage is in arrears at the time when the mortgagee takes possession, even although the rents and profits may exceed the annual interest, nor until the principal mortgage debt is entirely paid off. But where special circumstances exist, as for example where no arrears of interest are due at the time when the mortgagee enters into possession, or any agreement between the parties, the interest in arrears is converted into principal, there, and in such cases, annual rests shall be made." So where a mortgagee, having been some time in possession and occupation of the estate, sold and conveyed it, and the purchaser entered and took possession; held, in stating an account upon a bill to redeem, it was incorrect to make a rest in the computation of interest at the time of such transfer, and add the interest then due to the principal.[3] But where interest was payable semi-annually, interest with semi-annual rests was computed on the rents and profits received by the mortgagee.[4] So, the interest upon a mortgage having fallen in arrear, and the mortgagee in his account of arrears having made periodical rests, on which interest was reckoned; a general account was made of all arrears, based upon those rests, signed by the mortgagor, and confirmed by a trust deed, executed three years afterwards, for securing payment of the balance by a sale of the property. Upon a bill in equity filed by the mortgagee, and praying that the deed might be carried into execution; it was held, that the transactions above stated were not usurious, and a decree was made for a sale.[5] Alderson, B., remarks:[6] — "What evi-

[1] 2 Greenl. Cruise, 119, n.; Shaeffer *v.* Chambers, 2 Halst. Ch. 548.

[2] 2 Story's Eq. 1016 a.; acc. Finch *v.* Brown, 3 Beav. 70; Horlock *v.* Smith, 1 Coll. 287.

[3] Boston Iron Co. *v.* King, 2 Cush. 400.

[4] Gibson *v.* Crehore, 5 Pick. 146.

[5] Blackburn *v.* Warwick, 2 Y. & Coll. 92.

[6] Ibid. 99.

dence is there, arising out of the relative situation of the parties as mortgagor and mortgagee, to induce the conclusion that there was any oppression? There is not enough even in the original state of the transactions, but more especially when they are found to be based upon a regular agreement. Then, is there anything illegal in the agreement itself? It is said, that if parties enter into an original agreement by way of mortgage, they cannot recover more than £5 per cent. beyond the principal money, and that a stipulation, that if the interest is not paid at the time, the mortgagor shall pay interest upon it until the arrears are paid, that is illegal. Now, in holding this to be the rule, I presume the courts suppose that some advantage immediately accrues to the mortgagee under the deed, ultra the allowance of £5 per cent. I do not see why such interest might not be allowed, even where the stipulation to pay is contained in the original deed; but be that as it may, there the covenant being part of the original terms of the contract, is part of the original advantage accruing to the mortgagee, and the courts will not sanction such a contract. So neither will the courts allow interest upon interest, where the party comes to an account with his debtor, which he afterwards seeks to enforce through the medium of a court of equity. In that case, it is considered, that where parties who are entitled to the repayment of a principal sum with simple interest, have neglected to enforce payment of the interest, that was their own omission, and the Court leaves them to take the consequences of that neglect, and will not give them an equity founded upon their own laches. But there is no reason why, if the parties settle the matter between themselves, and the one party gives time to the other for payment of the arrears in consideration of the allowance of interest on the balance, they should not afterwards be compelled to abide by that settlement."

17. Money in court, at the time when the mortgagee entered, shall be applied to the interest.[1]

18. Upon the points, whether interest is recoverable in all

[1] Horlock *v.* Smith, 1 Coll. 287.

cases upon a mortgage, and to what amount, it is said: the rule, that interest shall not be recovered upon a bond beyond the penalty, does not apply where the bond is secured by mortgage, even though the mortgage is made by a surety, subsequently to the bond, unless it be expressly as security for the bond debt, and the interest to become due on the bond.[1] And interest will be recovered upon a mortgage, *as damages*, where it is expressly provided for up to the time of payment of the principal, if payment is not made on that day.[2]

19. It is said, "supposing the word *interest* to be omitted in the mortgage deed, it is conceived the estate would still be liable to all arrears; for interest is to be viewed not merely as an accident to the principal, but in fact as part of it, in the same manner as fruit is part of a tree. 3 Meri. 566. The yearly produce is to be considered as included under a general loan of the principal, and consequently as secured by the deed which secures the principal; besides, the payment of interest is a prominent object in the mortgage transaction and will in all cases be presumed, unless the contrary be expressed. Farquahar *v.* Morris, 7 T. R. 124."[3] And where a mortgage was conditioned, that, on payment of $500 at or before a certain time, the deed, and a note of even date, promising to pay said sum at that time, should be void; held, in a suit for redemption, it might be shown by parol evidence, that a note for $500 payable *on demand with interest*, was the one secured by the mortgage, and that, in order to redeem, the plaintiff must pay interest.[4] The Court say:[5] — "There is little danger that the purchaser of an equity could be deceived respecting the amount due by a statement of it contained in the mortgage, in cases where a note, bond, or other contract is referred to as secured by it. He would in such cases be informed, that other and more certain means of knowledge existed, and of

[1] Coote, 515.
[2] Ibid. 516.
[3] Pow. 291, n.
[4] Bourne *v.* Littlefield, 29 Maine, 302. See Parker *v.* Parker, 17 Mass. 370.
[5] Bourne *v.* Littlefield, 29 Maine, 302.

the source to which he might resort for more exact information. When the rule is once established, that the mortgage debt will remain secured after a change in the evidence of its existence, it becomes apparent, that it would be wholly unsafe to rely in any case upon the statement of the amount in the mortgage. The amount to be paid may have been increased by the accumulation of interest, by costs or (of) litigation, and by repairs and improvements, made upon the estate by a mortgagee who has entered into possession."

20. The question of interest often becomes important, where a particular tenant and a reversioner have distinct rights in the mortgaged estate, and the interest has been allowed to accumulate.

21. In Aston *v.* Aston,[1] the owner of the charge let it run in arrear eight years, and it was held, that this circumstance alone did not authorize the presumption, either that the interest was absolutely released, or that such neglect to demand it was intended to prejudice the remainder-man. So, in Roe *v.* Pogson,[2] Sir Thomas Plumer, V. C., expressed the opinion, that an incumbrancer will be entitled to arrears of interest as against a remainder-man, notwithstanding his neglect for many years to claim interest from the tenant for life. And, it is said, if a tenant for life die, leaving arrears of interest, his assets will be answerable therefor to the next remainder-man.[3] But if there be any connivance or unfair conduct between the particular tenant and the incumbrancer, in allowing the interest to accumulate, and eventually imposing it upon the remainder-man, through the death or insolvency of the particular tenant; such proceeding may prejudice the claim for interest against the remainder-man. Thus, in Bentham *v.* Haincourt, (Prec. Cha. 30,) where the first mortgagee had taken possession, but allowed the mortgagor, his son-in-law, to receive the rents, and the interest to fall in arrear; it was held, that a second mortgagee should have the same rights as if the interest had been regularly paid. In such case, the first mortgagee would be only post-

[1] 1 Ves. 264. See Earp, &c., 1 Pars. (Penn.) 453.

[2] 2 Madd. 457.

[3] 1 Pow. 293 *a*, n.

poned, not wholly deprived of his interest; but if the rents were insufficient to pay it and also satisfy the second mortgage, he might wholly lose such interest as against the second mortgagee, though not perhaps the mortgagor and his heirs.[1] So a mortgaged estate, in possession of a tenant for life, was devised in strict settlement. The mortgagee permitted the tenant for life to run the interest in arrear, and afterwards purchased the life-estate, took possession, and received the rents for about three years, when the tenant for life died. Upon a bill for foreclosure against the remainder-man, the defendant claimed to charge the plaintiff with the arrears of interest due at the time of his purchase, as well as those accruing subsequently to his taking possession. Held, if the mortgagee had entered as such, the surplus rents must have been applied in discharge of the arrears, and he should not be permitted to prejudice the reversioner's rights by entering as a purchaser. Decreed, that an account be taken of principal, interest, and costs, and of the rents and profits received by the plaintiff, which should be applied, first to the subsequent interest, and then to the preceding arrears.[2] So, in the case of Ivy *v.* Gilbert,[3] a term was created for raising portions out of annual profits. Under the usual proviso for the mortgagor's possession, the tenant for life continued to occupy and receive the rents. Held, as this was done by permission of the mortgagee, the effect was the same as if he had let the estate, and he should therefore account for the rents, having a remedy over against the personal representatives of the tenant for life.

22. With regard to the expenditures of the mortgagee in the care and management of the estate while he has lawful possession, (*e*) the general rule is, that the mortgagee shall

[1] Ld. Penrhyn *v.* Hughes, 5 Ves. 106.

[2] Penrhyn *v.* Hughes, 5 Ves. 99.

[3] 2 P. Wms. 20.

(*e*) If his possession is *unlawful*, he will not be allowed his expenditures. M'Carron *v.* Cassidy, 18 Ark. 34.

The *burden of proof* in reference to payments and expenditures is strictly upon the mortgagee. Strong *v.* Blanchard, 4 Allen, 538. While he is bound to use *reasonable* care and diligence in the management of the estate. Ibid.

be allowed for all necessary repairs, even though they exceed the rents and profits, but not for any which have not increased the value of the premises.[1] (*f*) He cannot, in general, have an allowance for making anything new;[2] and on the other hand is not bound to account for profits arising from permanent improvements made by him.[3] The obligation to make repairs, and the right to claim an allowance for them when made, are usually treated as equivalent propositions, — the one being implied in the other.

23. It is said, the mortgagee is not the substantial owner of the estate, and therefore only bound to make proper, judicious, reasonable, and necessary repairs; the nature and amount of which are said to depend upon the circumstances of each case,[4] or those apparently required to preserve the property and continue its productiveness.[5] That, if the *mortgagor* make improvements, they all go to satisfy the mortgage. On the same principle, if made by the mortgagee, they are made for his own benefit, and he cannot charge the mortgagor with their cost. (*g*) "*Volenti non fit injuria.*" And

[1] Gordon *v.* Lewis, 2 Sumn. 143; Reed *v.* Reed, 10 Pick. 398; Lowndes *v.* Chisholm, 2 McC. Ch. 455; M'Connel *v.* Holobush, 11 Ill. 61.

[2] Russell *v.* Blake, 2 Pick. 505; 15 Ill. 381.

[3] Bell *v.* Mayor, &c., 10 Paige, 49; Hopkins *v.* Stephenson, J. J. Marsh. 341; Hagthorp *v.* Hook, 1 Gill & J. 270.

[4] Dougherty *v.* M'Colgan, 6 Gill & J. 275; M'Cumber *v.* Gilman, 15 Ill. 381; Dexter *v.* Arnold, 2 Sumn. 125, 126; Gordon *v.* Lewis, Ib. 143.

[5] Per Dewey, J., Crafts *v.* Crafts, 13 Gray, 363.

(*f*) By the Civil Law, the mortgagee is allowed for improvements, though not absolutely necessary, with interest. 1 Dom. 365. In Missouri, for all permanent and useful improvements. Bollinger *v.* Chouteau, 20 Mis. 89.

(*g*) The law of *fixtures*, as between mortgagor and mortgagee, furnishes an illustration of the same general principle. It has been formerly questioned, whether *fixtures* would pass by a mortgage of the land, without being specially named. It seems to be now settled, however, that they do pass. Thus the mortgagee may have a bill for an injunction against their removal. And the mortgagor's possession is not deemed fraudulent, as in case of chattels. Quincy, 1 Atk. 477; Amos, 188, *et seq.*; Union, &c. *v.* Emerson, 15 Mass. 159; Robinson *v.* Preswick, 3 Edw. 246; Longstaff *v.* Meagoe, 2 Ad. & Ell. 167.

The question has also arisen, whether either mortgagor or mortgagee may

that there is a distinction between necessary repairs and highly beneficial improvements.[1] (*h*) "If it were otherwise,

[1] Clark *v.* Smith, Saxt. 122; Quinn *v.* Brittain, 1 Hoffm. Ch. 353.

remove erections which he himself has made upon the land. It has been held in Massachusetts, that one holding land subject to redemption may, even after a decree to redeem, remove a barn and blacksmith's shop erected by him, and so slightly affixed that they may be removed with but little disturbance of the soil. But in the same State it has been since decided, that a kettle, set by the owner of a freehold, who afterwards mortgages such freehold, cannot be removed by him or taken as his personal property, but passes by the mortgage, though *appurtenances* are not expressly named. And a still later case decides the same general principle, with regard to additions to the freehold made by the mortgagor *after* the mortgage; and the reason for the distinction between such a case, and that of improvements made by *a tenant*, is shown to consist in the fact, that both these parties are presumed to make improvements *for their own benefit;* which object will be best effected, by treating them in the one case as part of the freehold, and in the other as personal property removable by the tenant. The

(*h*) In a late case, the terms *necessary* and *convenient* are said to be used in a sense similar to that in which they are applied to the repair of highways. But, in the same case, mere *convenient* and *ornamental* repairs were alike rejected. Woodward *v.* Phillips, 14 Gray, 133. The criterion is also suggested, that the repairs are required to prevent *waste*. These the mortgagee is *bound* to make. M'Cumber *v.* Gilman, 15 Ill. 381. The mortgagee is limited strictly to *statutory expenditures*. Strong *v.* Blanchard, 4 Allen, 538.

In a late case, the improvements consisting in the erection of brick dwelling-houses on vacant city lots, by the mortgagee, who had been in possession six or eight years, the mortgagor knowing of the erection, and making no objection thereto; they were allowed in the mortgagee's account, to be payable only out of the rents and profits. Montgomery *v.* Chadwick, 7 Clarke, (Iowa,) 114.

In the same case, the profits were applied: (1) to pay the interest; (2) to pay for improvements, their rents being also applied to pay for them; (3) to pay the debt; and if it should be found that the improvements were not paid for in this way, then the mortgagor was to elect whether he would pay the balance, or permit the mortgagee to continue in possession until remunerated. Ibid. Held, also, that the mortgagee, where he cannot strictly account for profits, shall be charged with a fair rent on the premises as they were when he took them, with a rent on the improvements, if he is allowed for these. Ibid.

a mortgagee might from whim or caprice make what he considered to be improvements, but such as the mortgagor would not choose to have made. A mortgagor might be in a situation to redeem, by paying the principal and interest of the debt; but wholly unable to redeem, if obliged to pay also for such improvements as the mortgagee might be able and think proper to erect. Such a clog upon the equity of redemption would be subject to great abuses, and increase the difficulties in the way of the right to redeem, and might be resorted to by a mortgagee, knowing and disposed to take advantage of the necessities of the mortgagor, as a means of defeating the equity of redemption." [1]

24. Upon these grounds, if a building is very old and dilap-

[1] Per Buchanan, C. J., Dougherty *v.* McColgan, 6 Gill & J. 285, 286.

---

further reason was suggested, that one of the most usual purposes of mortgaging, is the raising of money to be expended in improvement of the estate. In New Hampshire, a mortgagor in possession is a trespasser, if he remove a mill which he has himself built, or anything attached to it. Taylor *v.* Townsend, 8 Mass. 411; Union, &c. *v.* Emerson, 15, 159; Winslow *v.* Merchants, &c., 4 Met. 306; Pettengill *v.* Evans, 5 N. H. 54. So it is said, in Maine: "Between landlord and tenant, many things are regarded as personal, which would be considered a part of the realty in an absolute conveyance or a mortgage. The mortgagor generally looks to the redemption of the property, and what he adds to it, of a permanent character, is for his own benefit; for it is but collateral to the debt. The case is different with a tenant, who cannot be considered as intending to incorporate the fixtures which he erects with the freehold." Per Wells, J., 29 Maine, 116. Upon this ground, if a mortgagor of a mill, after making the mortgage, put into it a shingle machine and apparatus attached to it; this becomes part of the freehold, and passes to the mortgagee after foreclosure. Corliss *v.* McLagin, 29 Maine, 115. An engine, placed in a saw-mill by a mortgagee in possession, is not a fixture. Cope *v.* Romeyne, 4 McLean, 384.

The mortgagor of a saw-mill, driven by water, converted the buildings into paper-mills, putting in proper machinery and a new water-wheel. The water-power proving insufficient, he placed a steam-engine in the cellar of one of the buildings, and applied the power directly to the driving-wheel, thus moving it precisely as the water would do. Held, the engine did not become subject to the mortgage, but might be removed. Randolph *v.* Gwynne, 3 Halst. Ch. 88.

idated, there is no rule requiring the mortgagee to incur a greatly disproportionate expense in repairing; and he certainly is not bound to make any new advances. So, in the case of Dougherty *v.* McColgan,[1] the property exceeded in value the sum lent, and there was no proof that it had begun to decay, or that the houses standing upon the premises were in a ruinous state, or were pulled down and new ones erected as a substitute therefor, and for the same purposes, but on the contrary they were built for new and different purposes. There was, moreover, no long-continued possession, and acts of ownership by the mortgagee and acquiescence by the mortgagor, without claim of the right to redeem, begetting the belief on the part of the mortgagee that the property belonged to him. Held, the mortgagee should not be allowed for such improvements. So in the case of *a mill*, if the mill could have been used with the machinery as it was when the mortgagee took possession; and if the repairs were for the purpose of increasing its speed, or enabling it to do more work than it had formerly done when the machinery was in order, so as to enhance the benefit of the possession; then no allowance is to be made for repairs. Otherwise, if they were really indispensable to keep the mill in operation.[2] So a mortgagee or assignee in possession is not allowed for improvements in *clearing wild land*, but only for necessary reparations, &c., and must account for the rents and profits received by him, except such as have arisen exclusively from his own improvements.[3] So, where a mortgagee had opened and worked mines; it was held, as he had, in the language of the Court, "actually sold away a part of the inheritance," he should be charged with his receipts, but disallowed his expenses.[4] But a mortgagee was allowed to charge for an *aqueduct*, the amount being small, and the aqueduct necessary to furnish water.[5]

25. The general rule upon this subject, however, seems by

[1] 6 Gill & J. 286.
[2] Clark *v.* Smith, Saxt. 123.
[3] Moore *v.* Cable, 1 Johns. Ch. 385.
[4] Thorneycroft *v.* Crockett, 16 Sim. 445.
[5] Saunders *v.* Frost, 5 Pick. 259.

no means definitely settled, and is liable to be controlled by special circumstances.[1] In Givens *v.* McCalmont,[2] Huston, J., says: — "The books are full of cases, as to what allowances for expenses, repairs, and lasting improvements shall be made to the mortgagee in possession. These cases do not exactly agree; in some, the cost of beneficial and lasting improvements has been added to the debt; but in the better opinions it would seem, the allowance has been confined to repairs. In several of the States the allowance seems to be confined to repairs. Everywhere the mortgagee in possession is chargeable for waste, and in England, particularly, for timber cut. There every part of every tree will bring cash. In a country covered with timber, which cannot be sold, and must be removed before any person can make any use of the land, it would seem that the law as to timber must be otherwise. In this State, no rule which will apply to every tract can be laid down. In some parts of the State, it would be difficult to find a farm in which a mortgagee in possession could cut more timber than was necessary to be used on the farm, without committing waste; but in places where many farms have less than ten acres in the hundred cleared, it is not waste to clear land, though in doing so the timber is collected in heaps and burnt. The situation and circumstances of each case must then be taken into view." Upon these principles, the Court held, in that case, that if the defendant had used the land cleared and the mill built by him so long as to pay the expenses of building the dam and mill; he should be charged for the rent even of his own improvements, from the time when he was paid the expense of them; with the rent of the farm in the state it was in when he entered, from that time; and, if the clearing of the land was an injury to the farm, he should be charged for waste, — otherwise not.

26. The mortgagee is allowed for improvements, which he has made, supposing himself to be the absolute owner,[3]

[1] 2 Greenl. Cruise, 118, n.
[2] 4 Watts, 463.
[3] Neale *v.* Hagthorp, 3 Bland, 590; McConnel *v.* Holobush, 11 Ill. 61; Hagthorp *v.* Hook, 1 Gill & J. 470.

though they exceed the rents and profits.[1] So, where the owner of the equity of redemption stands by in silence and sees improvements made by a purchaser, he cannot redeem without paying for them.[2] Though only the cost of improvements is allowed, not their present value.[3] (*i*) So, improvements made by a wrongful occupant enure to the benefit of the mortgagor, and the mortgagee in possession is chargeable for rents received by reason of them.[4] The Court in Maryland remark: — "The grounds of these decisions appear to be, that a mortgagee in possession is the legal holder of the estate, which the mortgagor may at any time redeem, and so prevent him from making any repairs or improvements; and if the mortgagee has been long in possession claiming adversely, and suffered to treat the estate as his own, and the mortgagor stands by and permits lasting improvements to be made; he shall pay for them."[5] And in the case of Cazenove *v.* Cutler,[6] Shaw, C. J., remarks upon the same subject as follows: — "As it is often a question of difficulty, what expenses shall be incurred for the benefit, protection, and preservation of the mortgaged property, in which both

[1] Mickles *v.* Dillaye, 17 N. Y. 80.
[2] Bradley *v.* Snyder, 14 Ill. 213; 17 N. Y. 80.
[3] Hogan *v.* Stone, 1 Ala. N. S. 496.
[4] Merriam *v.* Barton, 4 Verm. 501.
[5] Per Bland, Chr., Neale *v.* Hagthorp, 3 Bland, 590, 591.
[6] 4 Met. 251.

(*i*) If a purchaser from the mortgagor make improvements, the mortgagee in possession can retain only such a rent as the land would be worth without the improvements. Stoney *v.* Shultz, 1 Hill, Ch. 464.

Where valuable improvements have been made, equity, in decreeing a redemption, will pass such accompanying orders, as under the circumstances are necessary to effect substantial justice among the parties in interest. Thus A. and B. mortgaged to the defendant. A. afterwards gave a release to the defendant, who made improvements upon a part of the land with the knowledge of B. B. assigns to the plaintiff with notice. Upon a bill to redeem, held, the other part of the land should be assigned to the plaintiff, he not electing to contribute to the payment of the expenditures to the extent of his interest, as he might have done; and the partition above named being therefore necessary to effect substantial justice between the parties. Crafts *v.* Crafts, 13 Gray, 360.

the mortgagor and mortgagee have an interest, if the mortgagee in possession, and the mortgagor or his assignee, having the immediate right to redeem, consent and agree to any particular measures in this respect, and the expenses attending them, such consent being given with a knowledge or the means of knowledge, of the facts and circumstances; the expenses thus incurred must be reimbursed by the mortgagor or his assignee holding the equity, on redemption. Such expense must be considered, in point of law, a reasonable and necessary expense."

27. The mortgagee of a valuable estate, handsomely laid out, on which are many young fruit and ornamental trees, if he cannot by reasonable efforts let the estate for a sum sufficient to keep it in reasonable repair, including the preservation of the fruit-trees, may be allowed the cost of such repair; but not for a horse, cart, cow, farming utensils, and other expenses of cultivation.[1]

28. With regard to the specific items which shall or shall not be allowed, it is said in a late case: — "The law seems to be well settled; but in the great variety of cases which occur, it is difficult to prescribe a rule, broad enough, and at the same time precise enough, to apply to all cases." [2]

29. Where the items of repairs charged by a mortgagee were as follows: making new wall, rebuilding old wall, mowing bushes, door and casing, repairing windows, handle on front-door, papering and whitewashing four rooms, fire-frame, setting the same, bricks and laying two hearths, repairs on barn, carting off small stones, rails, posts, digging stone for wall; the Court remarked, that, looking merely at the report of the master to whom the case had been referred, it might be doubted whether some of these items could be termed necessary repairs, but that the question was one peculiarly fit for the master, and every reasonable presumption ought to be made in favor of his decision, inasmuch as evidence, not appearing in the report, was probably submit-

[1] Sparhawk *v.* Wills, 5 Gray, 423.

[2] Per Shaw, C. J., Woodward *v.* Phillips, 14 Gray, 133.

ted to him, which showed these repairs to be necessary.[1] And it has been since held, that the report of a master, as to the allowance to a mortgagee for repairs and improvements, is conclusive, unless a mistake clearly appears.[2] So, where a master in chancery, to whom it was referred to state an account between mortgagee and mortgagor, upon a bill to redeem, reported that certain repairs and improvements made by the former were, in the opinion of the master, necessary and permanent, and that he had allowed therefor such a sum as they would have cost a judicious and experienced farmer; but did not report the evidence: held, the principle adopted was substantially correct, and it should be presumed that the items of the allowance were supported by the evidence.[3]

30. In Godfrey *v.* Watson,[4] Lord Hardwicke said, that a mortgagee in possession was not obliged to lay out money any further than to keep the estate in necessary repair; but if he had expended money *in supporting the title* of the mortgagor when it had been impeached, he would allow it. So a mortgagee in possession will be allowed for the expenses of foreclosing, or advances of money for fines on the renewal of leases under which the premises were held.[5] So the mortgagee may, but is not obliged to *discharge prior incumbrances.* He will be allowed in his account all payments made for this purpose;[6] more especially where the mortgagor ought to have cancelled the prior mortgage.[7] (*j*)

[1] Reed *v.* Reed, 10 Pick. 398.
[2] Adams *v.* Brown, S. J. C. Mass. Mar. 1851; Law Rep. May, 1851, p. 38; 7 Cush. 220.
[3] Boston Iron Co. *v.* King, 2 Cush. 400.
[4] 3 Atk. 517; acc. Saxt. 122.
[5] Clark *v.* Smith, Saxt. 122.
[6] 2 Greenl. Cruise, 118, n.; Marine, &c. *v.* Biars, 4 H. & J. 343; Arnold *v.* Foot, 7 B. Mon. 66; Page *v.* Foster, 7 N. H. 392. See Lyman *v.* Little, 15 Verm. 576.
[7] Miller *v.* Whittier, 36 Maine, 577.

(*j*) A surety, holding a mortgage for his indemnity, and having paid the note, is entitled, upon a sale of the mortgaged premises, to charge all amounts paid by him to remove prior incumbrances, with simple interest; and is bound to account for moneys received by him, with like interest. Riddle *v.* Bowman, 7 Fost. 236.

31. Where mortgagees filed a bill to separate their interest from that of the mortgagor, after the levy of an execution against him upon the land; held, they should not be allowed from the fund reasonable *solicitor's fees.*[1] But costs of suit, and fees paid for legal opinions necessary in the execution of the trust, have sometimes been allowed.[2] So where a first mortgagee held as security for his claim certain chattels assigned to him and others, some of which were attached and taken from him by other creditors; and he thereupon brought an action, in good faith, and for the benefit of the assignees, for such taking, but did not prevail: held, he might claim the expenses of such suit, as part of the mortgage debt.[3]

32. If a mortgagee, not expressly authorized to effect *insurance* at the mortgagor's expense, nor entitled to require the latter to insure, does effect insurance without the privity of the mortgagor; he will not, as a matter of course, be allowed to charge the premiums in his account.[4] But it is otherwise, where he effects insurance at the request of the mortgagor, and pays the premium.[5] So, if a mortgagee in possession for breach of condition insure his interest, without any agreement therefor with the mortgagor; in case of a loss, which is paid to the mortgagee, the mortgagor, upon a bill to redeem and an account stated, cannot claim a deduction of this amount from the mortgagee's charges for repairs.[6]

[1] Harbinson *v.* Harrell, 19 Ala. 753.
[2] Neale *v.* Hagthorp, 3 Bland, 590.
[3] Pettibone *v.* Stevens, 15 Conn. 19.
[4] Dobson *v.* Land, 14 Jur. 288; Clark *v.* Smith, Saxt. 122; King *v.* The State, &c. 7 Cush. 8; Dobson *v.* Land, 8 Hare, 216; 13 Law Rep. 247; Faure *v.* Winans, Hopk. 283; Saunders *v.* Frost, 5 Pick. 259.
[5] Mix *v.* Hotchkiss, 14 Conn. 32.
[6] White *v.* Brown, 2 Cush. 412.

A mortgagee, who is bound to account with the mortgagor upon a sale of the mortgaged premises, and has paid moneys to remove a preëxisting mortgage, and also a right of dower, is not discharged from any part of his liability by having taken assignments of such mortgage and right of dower. Ibid.

A sum of money, paid by the mortgagee for the purchase from a third person of a mere supposed interest, but not actual, cannot be allowed. Veach *v.* Schaup, 3 Clarke, (Iowa,) 194.

33. The mortgagee will be allowed for *taxes*, the payment of which is necessary to protect the estate.[1] (*k*)

34. Where the mortgagee has, in pursuance of his authority, made sale of any part of the estate, the proceeds of sale will of course be deducted from the sum to be paid for redemption of the remainder. Thus a mortgage was made by separate instruments, at the same time, by and to the same parties, of real and personal property, to secure one debt. The mortgage of personal property provided, that, if the mortgagee should take possession for breach of condition, he or his assignee might sell the property at auction, and with the proceeds pay the expenses and the debt. The mortgagee afterwards assigned both mortgages to one person, and the right in equity to redeem the mortgage of the real estate was attached and sold on execution. The assignee afterwards took and sold the personal property. In a bill brought

[1] Mix *v.* Hotchkiss, 14 Conn. 32; Clark *v.* Smith, Saxt. 122.

(*k*) Upon foreclosure, in New York, taxes may be added to the debt; and any deficiency after such addition recovered by the mortgagee. So the mortgagor will remain liable for it, even after a new bond and mortgage from a purchaser of the estate. Eagle, &c. *v.* Pell, 2 Edw. Ch. 631; acc. Williams *v.* Hilton, 35 Maine, 547.

If a mortgagee pays taxes, he will be presumed to do so for the benefit of the security, and not on the personal liability of the owner of the lands, and such payment will give a lien on the land, and be added to the mortgage debt. Kortright *v.* Cady, 23 Barb. 490.

In Massachusetts, (St. 1848, c. 166, §§ 1, 2,) if any mortgagee of real estate, residing in the city or town where it lies, notifies the clerk in writing, before the assessment of a tax, that he holds such mortgage, describing the property; the collector, before selling, shall demand payment from him, according to sec. 18, c. 8, of the Revised Statutes. And if a non-resident mortgagee shall appoint an attorney, agreeably to the 20th section of said chapter, the demand shall be made upon the attorney.

By Stat. 8 & 9 Vict. c. 56, an incumbrancer in possession may obtain authority from Court, to improve by *draining*, &c., the cost to be charged upon the land, and paid by instalments, with interest. Among the expenses for which allowance may be made, have been mentioned paving contributions and ground-rent. Neale *v.* Hagthorp, 3 Bland, 590.

against him by the execution purchaser to redeem; held, if the sale of the personal property was a fair one, the actual proceeds, or, if not, the amount for which it might have been sold at auction, should be deducted from the sum due on the mortgage.[1] Held, also, the mortgagee having had the possession and use of both the real and personal property, and made sale of the latter, as above stated, and applied the proceeds to the debt; that, in stating an account in this suit, the rent of the premises might embrace the use and occupation of both the real and personal property for the whole time; provided there were no charge of interest on the proceeds of the personal estate from the time of the sale.[2]

35. Questions, relating to an account of the rents and profits, arise not only between the first mortgagee and the mortgagor, but also between the mortgagee and creditors of the mortgagor, first and second mortgagees, or a second mortgagee and the mortgagor.[3]

36. A second mortgagee, after satisfaction of the first mortgage, may claim from the first mortgagee, after notice, the rents and profits which have not been accounted for to the mortgagor, so far as the same are necessary to the satisfaction of his mortgage.[4]

37. A second mortgagee, who purchases and takes an assignment of the first mortgage, and with the mortgagor's consent sells a part of the mortgaged property, and wood growing upon another part, may apply the proceeds of sale, as against one claiming under the mortgagor, to the first mortgage, unless the mortgagor requests him, at the time of receiving them, to apply them to the second mortgage.[5]

38. If a prior mortgagee, who has entered and received the rents and profits, afterward purchase the equity of redemption, he does not, by such purchase, so far as the subsequent mortgagee is concerned, change his position or

[1] White *v.* Brown, 2 Cush. 412.
[2] Ibid.
[3] See Lewis *v.* DeForrest, 20 Conn. 427; Pomeroy *v.* Latting, 2 Allen, 221.
[4] Gordon *v.* Lewis, 2 Sumn. 143.
[5] Parker *v.* Green, 8 Met. 137.

accountability for the rents and profits received, but afterwards continues in possession as mortgagee.[1]

39. Mortgage to the defendant; a second to one A., and a third to A. and the two plaintiffs. A. assigns his interest in the two last mortgages to the defendant, who enters for non-payment of interest on the first mortgage. The plaintiffs bring a bill to redeem the two first mortgages. Held, the defendant could not apply the rents, &c., to the third mortgage, having entered only for breach of condition of the first.[2]

40. A mortgagee, in possession for the purpose of foreclosure, agreed with other mortgagees to waive his entry and possession, and that the parties should jointly occupy for the security and payment of their claims, and that the land should not be sold for five years without consent of the mortgagor. Held, the mortgagee first named was not hereby authorized to bind the mortgagor by any payments or expenditures which would not otherwise have been allowable.[3]

41. It has been held, that, if the mortgagee either enters on the land, but allows the mortgagor to take the profits, or permits him to use the mortgage for keeping off other creditors, he will be held accountable for the profits.[4] But if a first mortgagee enter conformably to the statute, for breach of condition, but permit the mortgagor to retain possession, without accounting for the rents and profits, he does not thereby himself become liable to account for them with a second mortgagee; even though he entered in order to prevent an attachment of the crops by the mortgagor's creditors.[5] Dewey, J., remarks: — "The language of the Revised Statutes, c. 107, requiring the mortgagee to account for rents and profits, would seem to embrace cases only of actual possession; and in the case of a mortgagor permitted by the mortgagee to continue in possession, and to take the profits, after a formal entry by the mortgagee, equity would clearly

[1] Harrison *v.* Wyse, 24 Conn. 1.
[2] Saunders *v.* Frost, 5 Pick. 259.
[3] Strong *v.* Blanchard, 4 Allen, 538.
[4] Coppring *v.* Cooke, 1 Vern. 270; Chapman *v.* Tanner, Ibid. 267.
[5] Charles *v.* Dunbar, 4 Met. 498.

forbid that the mortgagee should be held to account for them with the mortgagor. Does the law require a different rule when applied to the case of one holding as a second mortgagee? Where one who has made two mortgages is left in possession by both the first and second mortgagee, and takes the rents and profits without disturbance from the second mortgagee, clearly so long as no formal entry for condition broken is made, the first mortgagee is not liable to account in favor of the second. This being so, — a mere formal entry, avowedly, to foreclose, — but in fact, leaving the mortgagor in possession and enjoying the profits, will not of itself charge the first mortgagee to account with the second. The second mortgagee may take the possession, as against that of the mortgagor, if the latter holds in his own right, and thus exclude him and take the rents and profits to his own use. If such second mortgagee should be prevented from making such entry, by the previous entry and actual occupation of the first mortgagee, or by his claiming to exclude the second mortgagee by virtue of the superior title conferred by the first mortgage and the occupation under it; then he would be held to account, in favor of the second mortgagee, for the rents and profits." He proceeds to remark, that the second mortgagee might protect himself, by paying the first mortgage, and himself taking control of the premises; that the first mortgagee is not estopped by his mere entry, from denying that he received the rents, &c., because his possession might be afterwards abandoned without fraud; and that he could not, by reason of such entry, be treated as one who by his conduct induced another to part with his property, or forego the enforcement of his rights. "Nor do we think that the purpose of the formal entry, namely, to aid the mortgagor in withholding from the attachment of other creditors the produce of the farm, affects the present question. If the possession was not in fact in the mortgagee, the creditors might have made valid attachments of the produce of the farm. They did not interfere,

however; and we think the purpose of the first mortgagee's entry does not enlarge the rights of the second." (*l*)

42. Where a mortgagee has possession of only part of the premises, a subsequent incumbrancer cannot charge him as in possession of the whole.[1]

43. It is held that one acquiring tortious possession, and buying in a mortgage, is liable to a prior mortgagee for the rents and profits, including a fair rentable income, though he may not have received it, and also interest on each annual instalment from the time it falls due.[2]

44. A mortgagor may *assign* the surplus rents received by the mortgagee after satisfaction of the debt; and the assignee may maintain a bill in equity for an account.[3] (*m*)

45. Where the land mortgaged is probably insufficient

[1] Soar *v.* Dalbey, 15 Eng. Law & Eq. 124.

[2] Boyce *v.* Boyce, 6 Rich. Eq. 302.

[3] Gordon *v.* Lewis, 2 Sumn. 143.

(*l*) The same general principle has been applied in a late case to a different state of facts. Mortgage from A. and B. to C. to secure a joint debt, and entry for foreclosure. A. and B. attorned to C., and occupied till the death of A., when B. continued sole tenant. The administrator of A. brings a bill to redeem. Held, C. was not bound to account for the rents and profits prior to A.'s death, nor for those subsequently received, unless A. and B. were not partners, in which case B. would have a lien upon the estate, but tenants in common, and the plaintiff was kept out by C. Cilley *v.* Huse, 40 N. H. 358.

(*m*) The *mortgagor* may sometimes be held accountable for the rents and profits received by him. Thus the purchaser of an equity of redemption, where the mortgagee has not made an entry, may maintain trespass *qu. cl. freg.* against the mortgagor in possession for the rents and profits, without a previous entry. Fox *v.* Harding, 8 Shepl. 104. A purchaser from the mortgagor cannot claim to have the value of the improvements made by him deducted from the proceeds of a sale of the land. If the value has been thereby increased, he may have the benefit of it by paying the debt, or in the increased price of the land. On the other hand, if the land has depreciated, so as to bring less than the debt, the mortgagee bears the loss. Hughes *v.* Edwards, 9 Wheat. 489.

In case of a receiver, the owner of the equity may be charged with an *occupation rent*. 11 Paige, 436.

security for the debt, and the party personally liable is insolvent, more especially if no provision is made to give the mortgagee a lien on the rents and profits; after the debt is due, the mortgagee may have *a receiver* appointed by the Court.[1] (*n*) And the same course may sometimes be taken for the protection and benefit of the mortgagor. But there must, it is said, be fraud or imminent danger, to justify this proceeding;[2] and the bill or petition must set forth insolvency or danger of loss; not merely the complainant's title; and that the other party has entered wrongfully.[3] The rea-

[1] Astor *v.* Turner, 11 Paige, 436; Warner *v.* Gouverneur, 1 Barb. 36. See Jones *v.* Smith, 1 Hare, 43; Clark *v.* Curtis, 1 Gratt. 289; Best *v.* Schermier, 2 Halst. Ch. 154; Langton *v.* Langton, 31 Eng. Law & Eq. 422.

[2] Thompson *v.* Diffendufer, 1 Md Ch. 489.

[3] Clark *v.* Ridgley, Ibid. 70.

(*n*) A receiver is an indifferent person appointed by the Court of Chancery to receive the rents and profits of land or other thing in question, pending a suit, where it does not seem reasonable to the Court that the parties themselves should be in receipt of the rents. The power of appointing a receiver is a discretionary one, and does not affect the rights of the parties. The appointment is made by the master, on motion to the Court. The master ascertains the incumbrances and their priorities, and the receiver is directed, from the rents and annual proceeds, to pay the interest accordingly, and the balances into the bank. A receiver is never appointed, but in case of idiots and lunatics, except in connection with a pending suit. 1 Pow. 294, a. n. A receiver is an officer of the Court, but his appointment determines no right, nor does it affect the title of the property. It will not prevent the running of the statute of limitations. His holding is the holding of the Court, for him from whom the possession was taken. He is appointed on behalf of all parties, and, if any loss arises from deficiency in his accounts, the estate must bear it. Ellicott *v.* The United States, &c., 7 Gill, 307. The appointment of a receiver "does not grow directly out of the relations of the parties, or the stipulations contained in the mortgage, but out of equitable considerations alone. It is not a matter of strict right, but is addressed to the sound discretion of the Court." Per Pratt, J., Syracuse, &c. *v.* Tallman, 31 Barb. 208, 209. The effect of his appointment is not to oust any party of his right to the possession of the property, but merely to retain it for the benefit of the party ultimately entitled; and when such party has been ascertained, the receiver will be considered as his receiver. Ellicott *v.* The United States, &c. 7 Gill, 307.

sons must be imperative; as, that the security is inadequate, the rents and profits expressly pledged, or imminent danger of the waste, removal, or destruction of the property. It is, however, a question of sound discretion, depending on the circumstances.[1] And it is held, that the mortgagee has no right to a receiver, pending a suit for foreclosure.[2] Thus, upon a bill by a mortgagee, before default, to stay waste, but not requiring a sale, a receiver cannot be appointed.[3] Nor where the property is merely insufficient security for all incumbrances upon it, unless alleged to be insufficient for the particular debt of the plaintiff himself.[4] And the mortgage must be due,[5] though the precise amount need not be sworn to.[6] If payable by instalments, and if the property cannot be sold in separate parcels, so as to satisfy an instalment which is due; the mortgagee may foreclose the whole, and has an equitable claim to the rents and profits, upon filing his bill, and may have a receiver appointed.[7] If the property is so situated that it would require a bailiff or receiver in case it were his own, it is said the mortgagee may appoint one without authority of the mortgagor; but that he cannot in such case have a receiver appointed by the Court, nor appoint himself receiver, even though expressly agreed.[8] Thus, in Langstaffe *v.* Fenwick,[9] an account was opened, because the mortgagee had taken a poundage as receiver. So, in Scott *v.* Brest,[10] where a mortgage recited, that, for better securing the mortgage-money, it had been agreed that the mortgagee should be receiver of the rents, with a salary of £40 a year, by way of commission-money for his trouble and loss of time; this was held a usurious provision, though it was admitted, that the mortgagee might lawfully be appointed receiver, and, if the rents had been received merely in that character, the transaction would have been perfectly innocent.

[1] Morrison *v.* Buckner, 1 Hemp. 442.
[2] Gray *v.* Ide, 6 Cal. 99.
[3] Robinson *v.* Preswick, 3 Edw. Ch. 246.
[4] Warner *v.* Gouverneur, 1 Barb. 36.
[5] 4 Sandf. Ch. 405.
[6] Qarrell *v.* Beckford, 13 Ves. 377.
[7] Quincy *v.* Cheeseman, 4 Sandf. Ch. 405.
[8] Coote, 404.
[9] 10 Ves. 405.
[10] 2 T. R. 241.

To constitute usury, there must be a usurious taking. So, in Carew *v.* Johnston,[1] it was said by Lord Redesdale, that for the mortgagee to charge receiver's fees for himself, was fraudulently erroneous, and taking an unlawful advantage.

46. A receiver will not be appointed *against* a mortgagee in possession, at the suit of a creditor of the mortgagor, so long as the mortgagee will swear there is a balance due him, though the fact is contested, if he is able to respond for what he may receive.[2]

47. In Berney *v.* Sewell,[3] the Lord Chancellor said, he knew of no instance where the Court had appointed a receiver against a mortgagee in possession, unless the parties making the application would pay him off according to his claim, as stated by himself; that if a man has a legal mortgage, he cannot have a receiver appointed; he has nothing to do but to take possession. If he has only an equitable mortgage, and the prior mortgagee is not in possession, the second mortgagee may have a receiver without prejudice to his taking possession; but if he is in possession, the second mortgagee must redeem; and then, in taking the accounts, the first will not be allowed any sums paid over to the mortgagor after notice of the second mortgage. (*o*)

[1] 2 Sch. & L. 301; French *v.* Baron, 2 Atk. 120.

[2] Quinn *v.* Brittain, 3 Edw. Ch. 314.

[3] 1 Jac. & W. 647.

(*o*) Where a mortgagor becomes bankrupt, and a deficiency of his property is apprehended, and a prior mortgagee obtains the appointment of a receiver to collect the rents; such mortgagee acquires a lien upon the rents, and on motion they can be applied to the mortgage. Post *v.* Dorr, 4 Edw. Ch. 412.

A foreclosure bill was filed by a testator, in which two successive motions for a receiver were refused, one of them with costs. The testator died. His executors did not revive, but filed a new foreclosure bill, without having paid the costs of the refused motion. Held, they were at liberty to do so, but that it was not a course to be encouraged. Long *v.* Storie, 10 Eng. Law & Eq. 182.

A receiver against a mortgagee in possession was granted after decree, on

48. The Court will not, by an interlocutory order, before the hearing, charge a party who is in possession of an estate, and who has been ordered to pay an occupation rent to the receiver, with the amount of such rent, for any period antecedent to the date of the order for fixing the rent and appointing the receiver.[1]

49. Where a receiver of rents has been appointed, in a suit to which the mortgagee is not a party, and the rents are paid into court; the Court will not order them paid to him, although he had notified the tenants to pay him.[2]

50. A mortgage-debt being all due, and the security defective, the mortgagee brought a bill to foreclose, and obtained an injunction against the collection of rents by the purchaser of the equity, and the appointment of a receiver. The purchaser had taken a note from the tenant for the arrears of rent, secured by a mortgage of personal property from a third person. Held, no merger of the rent, and that the receiver was entitled to collect it, in preference to the purchaser of the equity.[3]

[1] Lloyd *v.* Mason, 2 My. & C. 487.
[2] Coote, 430.
[3] Lofsky *v.* Mauger, 3 Sandf. Ch. 69.

---

application of another mortgagee, a co-defendant. Hiles *v.* Moore, 15 Eng. Law & Eq 130. But it has been held, that a receiver will not be appointed against a first mortgagee in possession, on application of a second mortgagee, though the first mortgage is disputed, unless it be shown that the first mortgagee will be unable to respond for the rents. Trenton, &c. *v.* Woodruff, 2 Green, Ch. 210.

A third mortgagee took possession, and then bought the first mortgage, retained possession many years, and received a considerable sum. The second mortgagee applied for a receiver. The affidavit of the third mortgagee not satisfactorily showing that anything remained due on the first mortgage, a receiver was ordered. Ibid.

The mortgagee of a life-estate, over which a receiver had been appointed, having taken no steps to recover his debt and interest during the life of the mortgagor, was held not to be entitled after his decease to a fund in court, which had been paid in by the receiver from time to time, after keeping down the interest on a prior mortgage, affecting the fee; but the same was held to form part of the personal estate of the mortgagor. Flight *v.* Camac, 39 Eng. Law & Eq. 93.

51. In the case of Meaden *v.* Sealy,[1] the Court, in appointing a receiver upon motion, refused to authorize him to expend £100 in putting leasehold houses, included in the mortgage, into a fit state for occupancy; although £2,000 was due on the mortgage, and no payment of principal or interest had been made for a considerable time, and most of the houses were unfinished and unoccupied.

52. All parties in interest should regularly be before the Court, in order to justify a decree to account for rents and profits received. Thus, in 1808, Webb mortgaged to Haskell; in 1816, Haskell assigned his mortgage to the defendant, Lewis; and, in 1831, Lewis assigned it to the Portland Manufacturing Company. In 1812, the mortgagor conveyed to John Gordon, who, in 1832, conveyed to the plaintiff. Upon a bill to redeem against Lewis and the company; held, the plaintiff could not have a decree for payment of the rents and profits to him, until, by supplemental proceedings, other parties in interest had opportunity to appear.[2] (*p*)

[1] 6 Hare, 620.

[2] Gordon *v.* Lewis, 2 Sumn. 145.

(*p*) In Maine and Rhode Island, the mortgagor will be entitled to redeem, by paying or tendering the debt due with interest and costs, or performing or tendering performance of any other condition of the mortgage, together with the amount of reasonable expenses incurred in repairs and betterments, over and above the rents and profits. In Maine, if the mortgagor has paid money to the mortgagee or brought it into court, without deduction on account of the rents and profits received by the mortgagee, he shall be entitled to a restitution of the balance due him on this account. In Massachusetts, if the mortgagee or any one under him has had possession, he shall account for the rents and profits and be allowed for reasonable repairs and improvements, for taxes and assessments, and other necessary expenses in the care and management of the estate. If there is a balance due him, it shall be added to the amount which the mortgagor is to tender; if there is a balance due from him, it shall go to sink the debt. In Georgia, a mortgagee is made liable for taxes on the land, if the mortgagor does not pay them. Mass. Rev. St. 636; 1 Smith's St. 160, 161, 164; Prince, 848; Maine Rev. St. 557.

CHAPTER XVII.

EXTINGUISHMENT OF A MORTGAGE, BY PAYMENT, RELEASE, ETC.

1. In general, payment of the debt pays the mortgage also.
2. Payment after breach of condition; *waiver* as to time. *Changing the security* for a debt does not extinguish the mortgage. New notes, &c.
8. Effect upon the mortgage of legal and judicial proceedings, either between the parties, or in connection with strangers.
10. Of making the mortgagor the executor, &c. of the mortgagee.
11. Whether *a deposit* shall be treated as payment.
12. Surrender of the note for a release of the right of redemption; whether payment.
13. Exceptions and qualifications to the rule above stated. Extinguishment of a mortgage without direct payment; by renewal of notes, appointment of executors, legal proceedings, &c.
20. *Application* or *appropriation* of payments; mutual claims and offsets.
23. Presumptions and circumstantial evidence as to payment. Parol evidence.
30. The effect of payment upon the titles of the respective parties and their remedies.
42. Extinguishment of a mortgage, by a transfer of the land to the mortgagee.
49. *Release* or *discharge* of a mortgage. Discharge upon the record.
58. When a release may be avoided.

1. From the intimate connection between the debt secured by mortgage and the mortgage itself, which has been already explained, (see Chap. XI.,) it of course results as a general proposition, that whatever extinguishes the former, puts an end to the latter also.[1] And it cannot be kept alive by a mere parol agreement.[2] It is said, "A mortgage is *an assignment on condition;* the condition being performed, the conveyance is void *ab initio.* Equity dispenses with the time, and when the money is paid, the conveyance is void in equity and conscience."[3] "A mortgage is but *a security for the payment of the debt*, and when that is paid or extinguished, it can never be resuscitated."[4] "By payment, the whole mortgage is extinct; as much so as if released or paid and cancelled of record. It ceases to operate either at law or in

[1] Sherman *v.* Sherman, 3 Ind. 337; Champney *v.* Coope, 34 Barb. 539.
[2] 3 Allen, 339; Downer *v.* Wilson, 33 Verm. 1.
[3] Per Wigram, Vice-Chancellor, Viscount, &c. *v.* Morris, 3 Hare, 405.
[4] Per Duncan, J., Anderson *v.* Neff, 11 S. & R. 223.

equity, and the whole title revests in the mortgagor. To call it a mortgage would be an abuse of the word. It is no more than a blank." [1] On the other hand, entering of a discharge of a mortgage by the mortgagee does not, of itself, discharge the debt, but the security only.[2] (*a*) Considering a mortgage as a *conveyance*, it would be more technically accurate to speak of it as *discharged*, or *released*, than *paid;* but, when viewed in its true light, of a mere accompaniment to the debt, it is a correct as well as familiar use of language, to say that the mortgage as well as the debt is *paid.* (*b*)

2. The practice, almost universal in the United States, is to insert in the mortgage deed, whether of a freehold or a chattel interest, a proviso, that on payment of the money at the time mentioned the deed shall be void. And, as the time of performance is not of the essence of this contract, and may be waived by parol, the acceptance of the money

[1] Per Cowen, J., Cameron *v.* Irwin, 5 Hill, 276; acc. Furbush *v.* Goodwin, 5 Fost. 425; Blodgett *v.* Wadhams, Hill & Den. 65; Ledyard *v.* Chapin, 6 Ind. 320. See 3 Ind. 337; Law Rep. Nov. 1856, p. 399.

[2] Sherwood *v.* Dunbar, 6 Cal. 53.

(*a*) Payment of a *part* of a mortgage-debt is held a satisfaction and release of the mortgage, *pro tanto*, and parol proof of such release is admissible. Howard *v.* Gresham, 27 Geo. 347.

If a partnership debt is secured by a mortgage from two tenants in common, payment of the debt extinguishes the mortgage, and it cannot be kept in force as security for a debt due from one of the mortgagors. Thomas, &c., 30 Penn. 378.

(*b*) In the case of Jackson *v.* Davis, (18 Johns. 7,) it was held, that, though the recital in one deed of another *absolute* deed is evidence of the existence of the latter, an outstanding mortgage cannot be thus proved; because, if produced, it might appear to have been satisfied, which would revest a title in the mortgagor without release.

Payment, and a reconveyance of the premises, entitle the mortgagor to possession of *the title-deeds*, and he may claim damages for the loss of them unless explained. Brown *v.* Sewell, 21 Eng. Law & Eq. 508. Payment in bills of a specie-paying bank, current at the place of payment, is sufficient. Augur *v.* Winslow, 1 Clark, 258. See M'Donald *v.* M'Donald, 16 Verm. 630; Bolles *v.* Chauncey, 8 Conn. 389.

after the day amounts to a waiver of the time, and is a substantial performance of the condition.[1] (*c*) But the receipt of interest by a mortgagee, several times after it fell due, is no waiver of the right to enforce payment of a subsequent instalment and forfeiture.[2] Nor will such waiver result from an agreement to receive part of the instalment before due, not complied with by the mortgagor.[3]

3. A mortgage being given as security for a *debt*, and not merely for any particular *evidence of debt*, the general rule is, that no mere change in the mode and time of payment, nothing short of actual *payment of the debt*, or an express release, will operate as a discharge of the mortgage. The lien lasts as long as *the debt*.[4] (*d*) It is said, in reference to a note or bond secured by mortgage, "the mortgage and the note were two distinct securities. Nothing but payment of the debt will discharge the mortgage. This position is grounded on the words of the condition of the mortgage,

[1] 2 Greenl. Cruise, 123, n.; M'Millan *v.* Richards, 9 Cal. 365.
[2] The Contributors *v.* Gibson, 2 Miles, 324.
[3] Ibid.
[4] Morse *v.* Clayton, 13 Sm. & M. 373; 1 Freem. Ch. 307; Burton *v.* Pressly, 1 Chev. 2d part; Williams *v.* Starr, 5 Mis. 534; Spring *v.* Hill, 6 Cal. 17; Baxter *v.* M'Intire, 13 Gray, 171; Cleveland *v.* Martin, 2 Head, 128; Choleau *v.* Thompson, 3 Ohio, (N. S.) 424; Babcock *v.* Morse, 19 Barb. 140.

(*c*) The mortgagee cannot be compelled to receive payment or reconvey the property *before* the day named in the mortgage. Brown *v.* Cole, 14 Sim. 427; acc. 2 Greenl. Cruise, 123, n.; 9 Jur. 290; Abbe *v.* Goodwin, 7 Conn. 377. The purchaser of a part of the land cannot require the mortgagee to receive such payment, though the mortgagor is insolvent. Hoag *v.* Rathbun, 1 Clark, 12. The mortgagee may *waive* the mortgage lien, and accept payment without foreclosure. Byars *v.* Bancroft, 22 Geo. 34.

(*d*) A mortgage debt may be extinguished, as a personal claim against the mortgagor, and the land still remain liable for the amount of such debt. As where the mortgagee releases the mortgagor from his personal liability, in connection with a transfer by the latter to a third person, who assumes the mortgage debt. And whether the debt or the mere personal liability was meant to be discharged, is a question of fact, depending on the circumstances of the case, or the construction of the release. Tripp *v.* Vincent, 3 Barb. Ch. 614.

which always are, that if *the money be paid*, then the note or bond, as well as the mortgage deed, shall be void, and otherwise both shall remain in full force. By the terms of the contract, nothing but payment is to avoid it." [1]

4. Various applications of this principle are found in the books. The most frequent and familiar one is, that a mortgage made to secure a promissory note will remain security for any new note given in payment of the former one,[2] (*e*) unless there is an intention to the contrary.[3] And more espe-

[1] Davis *v.* Maynard, 9 Mass. 247.
[2] Burdett *v.* Clay, 8 B. Monr. 287; Bank, &c. *v.* Finch, 3 Barb. Ch. 293; Heard *v.* Evans, Freem. Ch. 79.
[3] Hadlock *v.* Bulfinch, 31 Maine, 246.

(*e*) The same rule is adopted, where both a new note and a new mortgage are taken. Smith *v.* Stanley, 37 Maine, 11. Taking a second mortgage is no waiver of a prior one made for the same debt. Burdett *v.* Clay, 8 B. Mon. 287. So taking personal security for a mortgage debt is no waiver of the mortgage. Ibid. The retaining of an old note and mortgage, as security for a new note, which is given for the amount remaining due on such note and mortgage, will not render the new note invalid for want of consideration. Langley *v.* Bartlett, 33 Maine, 477.

A mortgage given by one of several holders of land, for his ratable proportion of a debt secured by a mortgage upon the whole, is a continuation of the lien acquired under the original mortgage. Flanders *v.* Barstow, 6 Shepl. 357.

Where there was a mortgage to secure a bond, but not expressly referring to it, and the bond was avoided by a fraudulent alteration; the mortgage was still held valid, and evidence of the debt. Gillett *v.* Powell, Spears, Ch. 142. Where a mortgagee released the mortgagor from all the debts and liabilities secured by the mortgage, the land was held to be discharged. Armitage *v.* Wickliffe, 12 B. Mon. 488. Where land mortgaged is taken *for public uses*, the damages awarded become a substitute for the land, and subject to the lien thereof. Astor *v.* Miller, 2 Paige, 68. Especially, if the residue of the mortgaged premises are released from the incumbrance. Astor *v.* Hoyt, 5 Wend. 603.

A sale on credit of mortgaged property, under a power given in the mortgage, and the taking of the purchaser's twelve months' bond for the purchase-money, does not, by the laws of Louisiana, operate as a *novation* or extinguishment of the mortgage debt. Union Bank, &c. *v.* Stafford, 12 How. (U. S.) 327.

cially where the cancellation of the old note is made without authority of the mortgagee.[1] And as between the parties.[2] Thus in the case of Watkins *v.* Hill,[3] it was held, that, although a negotiable note is in Massachusetts, *primâ facie*, payment of the debt for which it was given, yet a new note, given in place of an old one which is secured by mortgage, to an assignee of the mortgage, is subject to the same security as the former note, unless intended as payment, and as between the mortgagee and mortgagor or their respective representatives; however it might be in reference to a purchaser of the equity of redemption. And, in the case of Pomroy *v.* Rice,[4] the qualification above suggested was rejected by the same Court, and the rule adopted without exception, that, where a mortgage and note are given to secure the payment of a sum of money, the renewal of the note does not operate as a discharge of the mortgage. This was an action upon a mortgage made October 25, 1825, to one of the plaintiffs, who were husband and wife, before marriage, to secure two notes for $200 each, one payable in three, the other in seven years, from April 1, 1826. About April 1, 1828, the mortgagee gave up these notes and took two new ones for $200 each, payable like the others; also a separate note for the interest, which was paid. The object of this renewal was to obtain the interest. In July, 1828, the plaintiffs intermarried, and the wife delivered the notes to the same person who procured the former renewal, and requested him to renew them in the husband's name. On or about April 1, 1829, he did so, taking two negotiable notes in the husband's name, each for $212, being the principal and one year's interest, one payable on demand, the other in four years. At these several renewals, nothing was said of the mortgage. The note payable on demand was paid. April 26, 1829, the mortgagor con-

[1] Baxter *v.* M'Intire, 13 Gray, 168.

[2] Cottes *v.* Jeffers, 7 Flor. 284; Birnel *v.* Eskie, 9 Cal. 104.

[3] 8 Pick. 522; Bank, &c. *v.* Rose, 1 Strob. Eq. 257; Dunshee *v.* Parmelee, 19 Verm. 172; M'Donald *v.* M'Donald, 16 Verm. 630; Bolles *v.* Chauncey, 8 Conn. 389.

[4] 16 Pick. 22.

veyed to the defendant with warranty. The defendant pleaded accord and satisfaction, upon which issue was joined. In giving the opinion of the Court in favor of the demandant, Mr. Justice Wilde remarked:[1] "It has been argued, that taking the new notes is *primâ facie* evidence of the payment of the old. But if it were, the circumstances, under which the notes were renewed, are abundantly sufficient to rebut any presumptive evidence that the mortgage debt was paid. Tidd was requested to have the notes *renewed*, which *ex vi termini* rebuts the presumption of payment." So, where a mortgage is made to secure the accommodation indorser of a note, which is to be discounted at a bank, and the usage of the bank is to renew such notes; the security is held to cover each renewal, whether so expressed in the mortgage or not.[2] So a mortgage was given to indemnify the mortgagee "from all losses by reason of his liability as surety." The mortgagee was surety upon the mortgagor's note, which was placed in a bank for collection. The mortgagor paid part of the note, gave a new one for the balance, which the mortgagee indorsed, and afterwards became insolvent, and the property was sold under a decree, and the proceeds brought into court. Held, although the mortgagee had actually paid nothing upon the new note, his claim had priority of those of subsequent mortgagees.[3] So the mortgage security will apply to a note given in renewal of a former one, although the former note was made jointly with another person, and the latter by the mortgagor alone.[4] So, although the notes were renewed by giving others with different names, but the mortgagee still remained liable as at first, no new credit was given, and he finally paid the new notes.[5] And it is held that the amount of the note may be diminished

[1] 16 Pick. 24.

[2] Enston *v.* Friday, 2 Rich. (S. C.) 427, n.; Handy *v.* Commercial, &c., 10 B. Mon. 98; Smith *v.* Prince, 14 Conn. 472.

[3] Markell *v.* Eichelberger, 12 Md. 78.

[4] New Hampshire, &c. *v.* Willard, 10 N. H. 210.

[5] Pond *v.* Clarke, 14 Conn. 334, (overruling Peters *v.* Goodrich, 3 Conn. 146.)

or even increased,[1] (*f*) or the new differ from the old one, in being made payable at a certain place.[2] And the new note may be applied otherwise than in payment of that which immediately preceded it.[3] So, where the original note had priority of a *homestead* right, such priority attaches to the note given in renewal, though the homestead has intervened.[4] And the rule more especially prevails, as against an incumbrance subsequent to the renewed personal security. Thus A. mortgaged to B. to secure a note, in return for which B. gave his note, to come due a few days later; both notes were put into market, and at maturity B. paid his own, and then, in return for a new note from A., gave A. a new note, with the avails of which the first note of A. was paid, it being agreed that the mortgage should stand as security. Held, that this repledging the security for the second note was good, against an incumbrancer whose lien attached after such repledging.[5] So if the mortgagee indorse the note and afterwards pay it, this does not discharge the mortgage.[6] And a renewal does not affect the security, even if there is no express agreement as to its continuance.[7] (*g*) Or, it is held, even

[1] Brinkerhoff *v.* Lansing, 4 Johns. Ch. 65; Gault *v.* M'Grath, 32 Penn. 392.

[2] Whittaker *v.* Dick, 5 How. (Miss.) 296.

[3] 32 Penn. 392.

[4] Strachn *v.* Foss, 42 N. H. 43.

[5] Robinson *v.* Urquhart, 1 Beasl. 515.

[6] Rogers *v.* Traders', &c., 6 Paige, 583.

[7] Cullum *v.* Branch, &c., 23 Ala. 797.

(*f*) One owing a debt of $2,000 assigned to the creditor two notes of $1,000 each, and also gave him a mortgage of real estate. The debt, except $1,100, being afterwards paid, the creditor gave up the notes, and took the debtor's notes for this sum. Held, the mortgage remained as security for the last-named notes. McCormick *v.* Digby, 8 Blackf. 99.

(*g*) Such agreement, however, is regarded as an additional reason for the application of the general rule. Thus a purchaser of lands executed to the seller notes and mortgages of the lands for the price. On the same day, the notes were given up, and a written agreement made between the parties, that the mortgagor would pay the amount of them upon certain notes from the mortgagee to a third person, given for the same lands, and that

though it was originally stipulated that the note should be renewed only to a certain time, and it was renewed for three years afterwards, even as against a subsequent mortgagee.[1]

5. A note may be extended by the extension of the mortgage which secures it. Thus, a mortgage being conditioned for the payment of two notes at different times, it was agreed to "extend the mortgage fifteen or twenty days." Held, the payment of each note was hereby extended twenty days beyond its maturity, but no further.[2]

6. If a guardian give a mortgage of indemnity to his surety, who joins him in a new bond; the mortgage is security for such bond.[3] So where a bond secured by mortgage was paid by a check, and a note, payable on time, which were indorsed on the bond, and the bond given up; and the note was not paid when due; held, the mortgage was not extinguished.[4]

7. The same rule is applied to the giving of bills of exchange for a mere mortgage debt. Thus a mortgage was made, to secure £10,000, with interest. Before any default, the mortgagor paid £7,000, by check, and gave two bills of exchange, drawn by himself and company upon himself, and accepted by him, for the balance, taking from the mortgagee the following memorandum: "Received, &c., (describing

[1] Farmers', &c. *v.* Mutual, &c., 3 Leigh, 69.
[2] Flanders *v.* Barstow, 6 Shepl. 357.
[3] Bobbitt *v.* Flowers, 1 Swan, 511.
[4] Maryland, &c. *v.* Wingert, 8 Gill, 170.

---

such payments should be applied on, and be a discharge of, the mortgages. The mortgagee assigned the mortgages and the agreement, and the assignee also assigned them. Upon a bill by the second assignee to foreclose; held, the mortgages were still in force, and the bill was maintained. Hugunin *v.* Starkweather, 5 Gilm. 492. The Court say (5 Gilm. 497): — "It was certainly competent for the parties, by their agreement, to change the mode, or particular terms of payment, or even amount, and still retain the mortgage as security for the sum due, if they thought proper. Such an agreement was not immoral, and it violated no law; and it would be hard to assign any reason why parties capable of contracting might not enter into such an agreement."

the securities,) which are in full of principal and interest due to me upon a mortgage, &c., and I do hereby undertake, whenever required, to execute a conveyance of the said property." The title and mortgage deeds of the premises were delivered to the mortgagor. The check was paid, but the bills were dishonored. The mortgagor conveyed to a trustee for benefit of creditors, and then became bankrupt, and the mortgagee never reconveyed the premises. The mortgagee brings a bill in equity against the mortgagor, his trustee, and his assignee in bankruptcy. Held, the above transactions did not discharge the mortgage, but the plaintiff was entitled to a decree against all the defendants for a restoration of the deeds and a foreclosure.[1] The Vice-Chancellor says:[2] — "If I were satisfied that the agreement between them was understood and intended by them to be, that the mortgaged estate should be absolutely discharged, whether the bills were honored or dishonored, productive or waste paper, however unusual or improvident I might consider such an agreement, I might very possibly have thought it right to give effect to such a contract clearly proved. It is contended that" the transactions above stated "amount to clear proof of such an agreement. I am not however satisfied that this as between themselves, was intended by them; the form of the receipt and the facts to which I have referred, being, in my judgment, neither conclusive on the point, nor of themselves sufficient to establish so improbable a state of things. I think the case also capable, if necessary, of being viewed in a manner analogous to that in which questions of lien between vendors and purchasers of real estate are considered. Generally, where a vendor receiving bills for the purchase-money signs a receipt for the amount as cash, and actually conveys the estate as upon payment, he retains, as between him and the purchaser, a lien on the estate for the money in the event of the bills being dishonored, unless the purchaser can show an agreement to the contrary. Why

[1] Teed *v.* Carruthers, 2 Y. & Coll. (Cha.) 31. [2] Ibid. pp. 39, 40.

should a mortgagee reconveying to the mortgagor, on receiving payment in the shape of bills, be in a worse situation than a vendor having or not having a binding contract prior to the conveyance? In the present case a reconveyance has not taken place; but probably if it had, (though it is not necessary to decide this point,) it would, in my judgment, have made no difference." So, where a note was secured by mortgage, and, after the equity of redemption had been sold on execution, the mortgagee received from the mortgagor a *recognizance*, acknowledged before a Justice of the Peace, for the sum due on the note, which was thereupon left with the Justice, who afterwards, without any direction from the mortgagee, delivered it to the maker; this proceeding was held not to discharge the mortgage.[1] So, where a mortgagee takes the assignment of a note, giving a receipt therefor, with the agreement to release the mortgage on payment of the note; the mortgage continues in force till such payment, nor is he bound to bring a suit on the note.[2] So to a real action upon a mortgage it is not a good plea, that the mortgagee agreed *puis darrein continuance* to accept in payment of the debt property to be appraised; that it was accordingly appraised for more than the debt; and that the mortgagor had tendered a conveyance, which was refused.[3]

8. And substantially the same principle has been applied in various cases, where an extinguishment of the debt, in terms secured by mortgage, has been set up on other grounds than actual payment of money, or even the giving of new security. Thus, in the case of Cary *v.* Prentiss,[4] it appeared that the defendant made a mortgage to the plaintiff to secure a note not negotiable; and subsequently a creditor of the plaintiff summoned the defendant in a trustee process against the plaintiff, recovered judgment against the defendant, and committed him on execution, but afterwards gave him a release of the judgment. In an ejectment upon the mortgage,

[1] Davis *v.* Maynard, 9 Mass. 242.
[2] Hynes *v.* Rogers, 6 Litt. 229.
[3] Rochester *v.* Whitehouse, 15 N. H. 468.
[4] 7 Mass. 63.

held, the facts above stated were no defence to the action. And the same principle has been applied, even where the mortgagor has paid the amount of the mortgage debt under the trustee process, but as due to a third person, the mortgagee not being party to the suit. Thus A. brought his bill against B., to foreclose a mortgage. Pending the proceeding, B. was garnished as the debtor of C., and judgment rendered against him as garnishee of the mortgage debt, on the ground that C. was in fact the owner of the mortgage, and that it was held by A. in fraud of the creditors of C. B. paid the judgment. Held, such payment was no defence, as the Court had no authority to render such judgment against him as garnishee, A. not being a party to the proceeding, and having no opportunity to defend his rights.[1] So the *commitment* of the mortgagor by the mortgagee himself, in a suit upon the debt, does not extinguish the mortgage.[2]

9. We have seen that proceedings against *the person* of the mortgagor do not discharge the mortgage. The question often arises, whether legal and judicial proceedings *in reference to the mortgaged property* itself, either between the parties, or in connection with third persons, operate as a constructive extinguishment. Upon this subject it has been held, that, in general, the release of a judgment recovered for the mortgage debt discharges the mortgage.[3] But where a mortgagee recovers judgment upon the mortgage debt, takes out execution, and gives a receipt, acknowledging full satisfaction thereupon; these facts do not show conclusively a payment and discharge of the mortgage. Thus, where the debtor, the day before taking such receipt, conveyed his estate to a third person, who, on the following day, transferred it to the mortgagee; held, the satisfaction of the judgment must be construed as designed merely to confirm the mortgagee's title; the supposition of any payment of money involving the absurdity, that either the mortgagor or his grantee released all title to the land, at the very moment when the money to

[1] Lawrence *v.* Lane, 4 Gilman, 354.
[2] Davis *v.* Battine, 2 R. & My. 76.
[3] Porter *v.* Perkins, 5 Mass. 237.

redeem the land was paid to the party taking the release.[1] So the recovery of a judgment upon one of two mortgage notes is no waiver or abandonment of the mortgage for that amount, unless the premises are taken in execution; and if they are so taken, but, by the interposition of a prior equity, the plaintiff is compelled to abandon his levy, his rights are the same as if no levy had been made.[2] So a wife was bound *in solido* with her husband in a mortgage to secure a subscription to a railroad company, to which mortgage the State was subrogated. The State afterwards caused the property to be sold under execution against the husband, as a defaulting tax-collector, and the wife, through a third person, became the purchaser. Held, the sale did not extinguish the mortgage.[3] (*h*)

10. A mortgage is not extinguished by the mortgagee's making the mortgagor his executor,[4] nor by the appointment of the mortgagor as administrator of the mortgagee. Thus, in the case of Kinney *v.* Ensign,[5] certain land having been twice mortgaged, after breach of condition, the mortgagor was appointed administrator of the second mortgagee, and returned an inventory, including his own debt. An assignee of the prior mortgage purchased the mortgagor's right of redemption. Held, in a bill to redeem, brought by the mortgagor against such assignee, that the taking out of administration was not, in reference to the defendant, a payment and extinguishment of the second mortgage, but the plaintiff was

[1] Perkins *v.* Pitts, 11 Mass. 125. See *infra*, § 18.
[2] Applegate *v.* Mason, 13 Ind. 75.
[3] Hawkins *v.* McVae, 14 La. An. 339.
[4] Miller *v.* Donaldson, 17 Ohio, 264.
[5] 18 Pick. 232.

(*h*) In Pennsylvania, since the statute of April 11, 1835, a mortgage which is the first incumbrance on the premises is not discharged by a sheriff's sale, under a judgment for taxes subsequently assessed. Perry *v.* Brinton, 1 Harr. 202.

Under the statute of Indiana, a mortgagee, having recovered a judgment for his debt, may, if he have not taken out an execution, proceed to foreclose his mortgage. Hensicker *v.* Lamborn, 13 Ind. 468.

entitled to redeem. Chief Justice Shaw remarked:[1] — "The taking of administration by the debtor is not in fact or in law, to all purposes, payment of the debt. As between the administrator himself, and those beneficially interested in the estate, he is held to account for it as a debt paid, from convenience and necessity, because the administrator cannot sue himself, and cannot collect his own debt in any other mode than by crediting it in his administration account. The complainant is in a situation to do just what any other administrator would do, as if he were not himself the original mortgagor. On redemption, he will be put into possession of the estate; but he will hold in *autre droit;* his seisin and possession will be according to his title, and that will be, and will appear by the record to be, in his representative capacity. Then there are express statute provisions, that the estate recovered shall be held to the use of the heirs of the intestate mortgagee, and the administrator shall have a license to sell, if necessary for the payment of debts." So A. conveyed land to his children, and afterwards, but before registration of the deed, mortgaged it to B., to secure a note, and died intestate, leaving personal estate, after satisfaction of the widow, not equal to the note. C., one of the children, became administrator, paid the note from his own money, and took an assignment of it, with a conveyance of the land. He afterwards transferred the note and the property to D., who brings a bill to foreclose against the heirs of A. Held, the transaction was not a *payment* by C., as administrator, but a purchase of the mortgage debt by him, on his own account, and the plaintiff was therefore entitled to foreclose.[2] So one Squires, having made a note to Lothrop, gave him a mortgage as security, having previously made a deed to his children, which was not recorded till after the mortgage. Under this conveyance, the defendants claimed a portion of the land mortgaged. The plaintiff, as assignee of the mortgage, brings a bill to foreclose. It appeared that his title was

[1] 18 Pick. 236, 237.

[2] De Forest *v.* Hough, 13 Conn. 472.

derived in part through a son of the mortgagor, who, at the time of paying the debt, and taking an assignment of the mortgage, was also an administrator upon the estate of the mortgagor, deceased; but the payment was made from the administrator's own funds, and the land transferred to him by the mortgagee. Held, the plaintiff might maintain a bill for foreclosure against the other children of the mortgagor, the mortgage not being extinguished by the payment and transfer above stated.[1]

11. The question sometimes arises, whether a *deposit* of the amount of the mortgage debt will operate as payment. Thus a mortgagor sold the land, received therefor the purchaser's note, and agreed to extinguish the mortgage. He then delivered the note to the mortgagee, with an agreement that the proceeds, when received, should go in payment of the mortgage. He also deposited with the mortgagee the amount of the mortgage debt, in order to stop the interest, but with an agreement that it should not go to pay the mortgage. The mortgagee gave a receipt for the money, and retained the mortgage and the purchaser's note. This note was not paid. Held, the facts above stated did not show a payment of the mortgage, inasmuch as it was agreed by the parties, at the time the money was deposited, that it should not discharge the mortgage.[2] But where the solicitor of a mortgagee refused to receive from the mortgagor a partial payment on the mortgage, as a payment to stop interest, but consented to receive it as a deposit, with the understanding, that, if the mortgagee would take it as payment and allow interest, it should be indorsed on the mortgage; and the mortgagee refused to receive the money, unless the whole debt was paid; but the solicitor afterwards handed it to him, with the understanding that he was not to allow interest, till payment of the balance, of which the mortgagor had notice, and assented thereto; and the mortgagee, on receiving the money, used it as his own: held, the money should be

[1] Hough *v.* De Forest, 13 Conn. 473.

[2] Howe *v.* Lewis, 14 Pick. 329.

applied as payment, at the time it was received and used by the mortgagee.[1] So where a mortgagor, after the mortgage debt became due, delivered to the mortgagee $1,000, which, after being retained for a few days, was returned to the mortgagor at his solicitation, and not indorsed upon the mortgage; held, a payment on the mortgage, and that the redelivery did not, as against creditors, revive the mortgage.[2]

12. Though a mortgagee give up the mortgage note to be cancelled, the inquiry is still "open, whether this was a payment of the note, or a mere release from personal liability on the note, independent of the lien on the land. If the debt was not in fact paid, and the land was still to be charged with the same by the arrangement of the parties to this settlement the mere giving up of the note would not discharge the mortgage."[3] So a surrender of the mortgage note to the mortgagor, in consideration of a release of the equity of redemption, will not necessarily operate as a payment of such note in reference to a second mortgagee. Thus, where a mortgagor released his equity of redemption to the former of two mortgagees, who in consideration thereof gave up his mortgage note; held, the second mortgagee could not foreclose without paying the first mortgage.[4] Swift, C. J., says,[5] (three Judges dissenting,) "The operation of this transaction is merely the taking of the pledge for the debt. This is no more than adjusting the claims between the first mortgagee and the man who has the ultimate equity of redemption; it is only relinquishing the legal remedy on the note; it is no payment of it. There must be a payment of the debt by something besides the thing pledged to secure it; otherwise there is no satisfaction of the mortgage." So, where a mortgagee consented to a sale by the mortgagor, and the purchaser gave his notes for the purchase-money, secured by a mortgage upon the premises, and the first mortgagee received an assignment of a part of such notes in payment of his debt; held,

[1] Toll *v.* Hiller, 11 Paige, 228.
[2] Marvin *v.* Vedder, 5 Cow. 671.
[3] Per Dewey, J., Hemenway *v.* Bassett, 13 Gray, 380.
[4] Baldwin *v.* Norton, 2 Conn. 161.
[5] Ibid. p. 163.

the rights of the first mortgage were not simply those of an assignee of the second mortgage notes, and, in receiving them, he did not relinquish his right to prior satisfaction out of the property.[1] So, where a mortgagor suffers the mortgaged premises to be sold for taxes, and buys them in, he does not thereby defeat the lien of the mortgage, but his purchase is merely a payment of the taxes by him.[2]

13. In qualification of the general rule, that a mortgage will be extinguished only by payment, not by mere change of the evidence of debt, it is to be remarked, that, where the particular facts of the case itself, or any other transaction between the parties, indicate their intention and understanding, that the substitution of a new security shall operate as payment of the old debt, (*i*) and there is no useful or equitable object to be effected by an opposite construction; the mortgage is held to be extinguished, though not in form discharged or cancelled. It is said, that the mortgage is extinguished by payment *from the debtor's funds*.[3] And where the mortgage debt is paid, the mortgage cannot be kept alive by a parol agreement, as security for another debt.[4] Thus, in the case of Fowler *v.* Bush,[5] a note payable by instalments was secured by mortgage. After the first instalment became due, the holder, being an assignee of the mortgage, demanded

[1] Bank, &c. *v.* Tarleton, 23 Miss. 173.
[2] Frye *v.* Bank, &c., 11 Ill. 367.
[3] Kinley *v.* Hill, 4 Watts & S. 426. See DeVendal *v.* Malone, 25 Ala. 272.
[4] Mead *v.* York, 2 Seld. 449.
[5] 21 Pick. 230.

(*i*) The question of intention, as in other like cases, is for the jury. Thus, if a mortgagor give, to an assignee of the mortgage, notes secured by another mortgage, for the amount paid by the assignee; whether this is payment or only additional security, is a question of fact. Collamer *v.* Langdon, 3 Wms. 32.

Pending a bill to foreclose a mortgage, an assignment of a judgment was received by the attorney of the complainant from the debtor, in part-payment. There was no evidence that it had not been realized, and the complainant continued to retain the same attorney after he must have known of such assignment. Held, a ratification and adoption of the attorney's act in receiving it. Byers *v.* Fowler, 14 Ark. 86.

payment, saying that if that instalment were paid, he could sell the securities. The mortgagor thereupon gave him a note on time, payable to order, for the sum due, which the holder proposed to have discounted at a bank; and at the same time indorsed on the former note — "Received the first instalment on the within," naming the sum. In an action upon the mortgage by a subsequent assignee against the mortgagor, it was held, that these facts constituted a payment of the first instalment, and not merely a change of security, and that the mortgage was *pro tanto* discharged. So one Temple mortgaged land to Bailey, the defendant, to secure several notes payable at different times, and afterwards mortgaged the same land to Holman, the plaintiff. Subsequently, and before maturity of either of the notes, Temple gave the defendant a warranty deed of the premises, in full satisfaction and discharge of these notes and another one. The notes were given up, but the mortgage was not discharged. Upon a bill in equity to redeem, brought by Holman against Bailey, it was held, that payment of the notes before maturity was as effectual to defeat the defendant's mortgage, as if made at the time they became due; that if the plaintiff's mortgage was valid, he had a complete and adequate remedy at law against the defendant, by writ of entry; and that the bill could not be sustained.[1] So in the case of Abbott *v.* Upton,[2] J. Upton gave to Brigham a mortgage, dated December 20, 1832, conditioned to secure a note for $400, payable to Smith, signed by Upton as principal, and Brigham as surety, or indemnify Brigham therefrom. On the 6th of February, 1834, the plaintiff, with one Day, at the request of Upton, took up the note, and gave a new one for $404, signed by Upton, Day, and the plaintiff, payable to Smith in one year, with interest. At the same time, Brigham, by a writing not under seal, assigned the mortgage to Day and the plaintiff, and the mortgage and the note secured by it, which appeared to be cancelled, were passed to the

[1] Holman *v.* Bailey, 3 Met. 55.

[2] 19 Pick. 434.

plaintiff. August 11, 1836, Brigham duly assigned the mortgage to Day and the plaintiff, and, on the 27th of August, Day assigned his interest therein to the plaintiff. On the 6th of February, 1834, Upton gave to Day and the plaintiff a mortgage of personal property, to secure them against their liability on the note signed by them. After this became absolute, Day and the plaintiff took possession of the property, which, in the opinion of Upton, was worth from $500 to $600. July 8, 1834, Upton conveyed the demanded premises to the defendant, N. Upton. A verdict was taken for the plaintiff, subject to the opinion of the Court. The plaintiff offered to discharge the personal property, upon satisfaction of the judgment in this case, if he should prevail. It was held by the Court, that when the note to Smith was paid and discharged, Brigham was fully indemnified, and the condition of the mortgage saved; and that when J. Upton gave a new note, for a different sum, with other sureties, and other security to indemnify them, Brigham's interest in the land ceased, and nothing remained to pass by his assignment. So A. gave a mortgage to B., to indemnify B. in case he should have to pay the debt of A., conditioned that if A. should pay and satisfy his note, by renewal or otherwise, then to be void. A. renewed his note with different securities, and B. assigned the mortgage to them. Held, the assignment did not cut off the intervening rights of other mortgagees, and the rights of B. ceased upon the renewal, a transfer to others not having existed in contemplation of the parties, at the time of the execution of the mortgage.[1] So a mortgagor paid and took up the mortgage note, and the next day redelivered it, taking back part of the amount paid, and the balance being indorsed upon the note; with an agreement that the mortgage should continue to be security for the sum left due, and for a collateral liability. A creditor, without notice, having levied an execution upon the land; held, his title should prevail over that of the mortgagee.[2] So, on September 15, 1813, a mort-

[1] Bonham *v.* Galloway, 13 Ill. 68. [2] Bowman *v.* Manter, 33 N. H. 530.

gage was given as security for the indorsement of a note dated July 27, 1813, for $400, payable ninety days after date at the Middletown Bank, and there discounted for the maker's accommodation. When that note fell due, it was taken up, the indorser paying $83, and a new note, with the same names, given for the balance. September 3, 1814, the land was mortgaged to another person. September 6, 1814, the first mortgagee indorsed a note for $110, part of the original debt of $400 at the bank, which he was afterwards obliged to pay. Held, the indemnity secured by the first mortgage being precisely coextensive with the liability of the mortgagee as indorser, his lien extended only to the first note, and, as to subsequent advancements, he was only a general creditor.[1] Hosmer, C. J., says:[2] — "The condition provided, that, 'if the said Curtiss should pay the said note, and indemnify the said Goodrich from his said indorsement, the deed should be void.' The specific contract referred alone to a note dated the 27th of July, 1813. By the non-payment of this note Goodrich might be damnified, and precisely coextensive with the possible damage was the contract of indemnity. The debt he never guaranteed, except through his indorsement; which contract would be extinguished so soon as the note was paid, or another, with the consent of the holder, was substituted for it. When Goodrich indorsed the above note, he had no idea of indorsing another, or of continuing his responsibility beyond his actual contract. The indorsement of the subsequent notes, therefore, was the result of a subsequent contract." (*j*)

[1] Peters *v.* Goodrich, 3 Conn. 146, (overruled in 14 Conn. 334.
[2] Ibid. 150.

(*j*) On the other hand, Chapman, J., (dissenting,) says (Ibid. 154):— "Nothing but a strict performance of this condition could prevent the legal estate from vesting in the defendant. It is admitted that the condition was not performed. The legal title is in the defendant, and the object of this bill is to divest him of it. This the plaintiff is entitled to do, provided he can show that the defendant has been indemnified. The mortgagor agrees to

14. If the mortgagee takes, for the amount due on the mortgage, the note of an assignee of the mortgagor, including annual interest, and gives up to the assignee the mortgagor's notes; this is not, unexplained, a mere renewal, but the substitution of a new security, and such a payment as discharges the mortgage.[1] So where, in case of a purchase of land by three persons, each giving a bond for his share of the price, secured by a joint mortgage, the vendor afterwards gave up one of the bonds, without the consent of the other obligors, taking a different security; held, the others were mere sureties for this obligor, and were discharged, as to him, by this proceeding.[2] So where a mortgagee released to two tenants in common, and took a mortgage from one who had bought the other's interest, for a less sum and at a different rate of interest, the mortgage was held subject to intervening liens.[3]

15. And a mortgage may be extinguished by the laches of the mortgagee in enforcing a new or substituted security. Thus a mortgagor sold the land, agreeing to remove the incumbrance. It was also agreed between him and the mortgagee, that the latter should take a new note and another mortgage for his debt, and not enforce the former

[1] Hadlock *v.* Bulfinch, 31 Maine, 246.

[2] Van Rensselaer *v.* Akin, 22 Wend. 549.

[3] Dingman *v.* Randall, 13 Cal. 512.

---

indemnify the defendant *in all respects*. Has the mortgagor ever paid the note of $400? No. Has he indemnified the first mortgagee? No; but the first mortgagee has indorsed a second note, which was given for a part of the original note, and therefore in equity he has lost his lien. The whole argument proceeds upon a fallacy. The note is but *evidence* of the debt. The renewal of a note is no payment of the debt. It is an unvarying rule in a Court of Chancery, never to divest one of a legal estate, so long as he can show an equitable lien on it. Should the first mortgagee, after forfeiture, receive payment in counterfeit money and give a receipt in full for it, the second mortgagee could not redeem, without paying the whole debt, unless the first mortgagee had released. The same rule applies to any mistakes in a settlement." Brainard, J., concurred.

mortgage, if the property included in the latter was sufficient to pay the debt. The property was thus sufficient, but, in consequence of the mortgagee's delaying for sixteen months to record the new mortgage, it was lost to him by other deeds and mortgages from the mortgagor. Held, the first mortgage was discharged.[1]

16. More especially, where a different construction would injuriously affect the rights of third persons, a mortgage will be held not to continue in force as security for a substituted personal claim. Thus, in case of a mortgage to secure the mortgagee for an indorsement of the mortgagor's note, the note was paid when due, but the mortgage afterwards assigned, for valuable consideration, with the assent of the mortgagor. Previous to the assignment, the mortgagor made another mortgage, which was also assigned, and the mortgage and assignment recorded before the assignment of the former mortgage. Held, after satisfaction of the first mortgage, the parties might revive the security as between themselves, and also as against themselves in the hands of an assignee, but not as against third persons; and, as the second mortgage and the assignment of it were both recorded before the assignment of the first, the holder of the first was affected by notice, and was not entitled to protection, as against a latent equity.[2] So one of two mortgagors, having assumed the mortgage debt, executed a new mortgage to secure it, and an individual debt of his own, the mortgagee holding the old mortgage as collateral security. The mortgagor assigned his property, afterwards, for benefit of creditors, and the premises were sold by his assignees, free from all incumbrances. The purchaser and the mortgagee arranged with the assignees, so that the purchaser secured the money due on the second mortgage to the mortgagee, who assigned the old mortgage to the purchaser, who brings a bill for foreclosure. Held, the securing of the debt by the purchaser was a satisfaction of the mortgage, which became *functus officio*, and incapable of transfer as a subsist-

[1] Teaff *v.* Ross, 1 Ohio, St. 469. [2] Purser *v.* Anderson, 4 Ed. Ch. 17.

ing security.[1] So, A. having given a mortgage to B., A. and B.'s agent agreed to convey to C., on his securing the mortgage debt. C. gave to a succeeding agent of B. a deed of trust of slaves, to secure the mortgage and other debts. Held, the mortgage was discharged.[2] So A. conveyed to B. and C., taking back a bond of defeasance. Afterwards, for the purpose of enabling A. to pay B. and C., A. surrendered to them their bond, and they conveyed to D., to whom A. also conveyed his remaining interest; and thereupon D. advanced a certain sum, in satisfaction of the amount mutually estimated by A. and B. and C. to be due to the latter, and D. at the same time executed a bond of defeasance to A. Held, although this amount was less than the sum actually due to B. and C., yet their mortgage was discharged.[3]

17. We have seen, (§ 10,) that, under some circumstances, the *death* of the mortgagor, and the proceedings connected with a settlement of his estate, will not operate as payment. There are cases, however, where a mortgage may be extinguished by the relative position of the mortgagor or mortgagee, and the representatives of one or the other of these parties, after his death; and by the legal proceedings connected therewith. Thus a mortgage was made to the father of the mortgagor, as security for a bond. Before breach of condition, the mortgagee died, having appointed his son to be his executor. The son then mortgaged anew, with the usual covenants against incumbrances and for warranty, and the second mortgagee assigned his mortgage. Subsequently, the son, as executor, assigned the mortgage of his father, with the bond. The assignee of these securities recovered possession in a suit against the son as mortgagor; and the former assignee brings the present action for the land against the plaintiff in the other suit. It was held, that the action should be maintained, because, whether the appointment of the son as executor extinguished the mortgage given by him or not, it was certainly extinguished by his

[1] McGiven *v.* Wheelock, 7 Barb. 22.
[2] Towler *v.* Buchannans, 1 Call, 187.
[3] Hodgman *v.* Hitchcock, 15 Verm. 374.

second mortgage, which conveyed the land as discharged of all incumbrances.[1] So, in case of a mortgage to secure a bond, the mortgagee having died, the mortgagor was appointed his administrator, and returned an inventory, including the bond debt. He afterwards settled his first account, charging himself with the amount of personal estate returned in the inventory; and a second account, charging himself with the balance of the first. Thereupon the Probate Court passed a decree, ordering a distribution of the balance among the heirs. Held, by these proceedings the bond debt was paid, and no title to the land passed by a subsequent assignment of the bond and mortgage by the administrator.[2] So a sale, under order of the Orphans' Court, for payment of debts of an intestate, of lands mortgaged by a former owner, on which the intestate paid the interest, discharges the mortgage.[3] So, where a mortgage debt is discharged by a bond of the heirs, who are also assignees of the mortgage, to prevent a sale of the land; the mortgage is also discharged.[4] So although, where the owner of land, subject to mortgage given in trust for certain heirs, is appointed trustee of the heirs, thereby acquiring a legal title to the mortgage, the mortgage is not thereby merged; yet, if he afterwards convey with warranty, he will be estopped by his covenants to enforce the mortgage against the purchaser for his own benefit, though nothing but actual payment can deprive the heirs of their right in the mortgage. Such payment will extinguish the mortgage, both in law and equity, unless the trustee misapply the money with the grantee's knowledge and consent. And unless it have been thus misapplied, the law will apply it to the mortgage. If the conveyance, made subject to the mortgage in trust, contains an agreement on the part of the grantor to pay all incumbrances, and a part of the price is retained to await such payment; the grantor, subsequently becoming trustee and thus entitled to the mort-

[1] Ritchie *v.* Williams, 11 Mass. 50.
[2] Ipswich, &c. *v.* Story, 5 Met. 310.
[3] Moore *v.* Shultz, 13 Penn. 98.
[4] Robinson *v.* Leavitt, 7 N. H. 73; Richardson, Ch. J., dissenting.

gage, is bound to apply the money thus retained to the mortgage.[1]

18. We have already (§ 8) referred to the cases, in which the lien of a mortgage is not affected by legal or judicial proceedings connected therewith. With reference to the effect of a judgment or decree, in a suit upon a mortgage, on the mortgage itself; it is held, that a mortgagee, entering under a writ of possession, holds under his mortgage title, not under such writ. Hence, notwithstanding a release of the judgment, the mortgage will be foreclosed by his remaining in possession for the statutory period, unless he intended to waive his title as mortgagee, which, in case of conflicting evidence, is a question of fact for the jury.[2] But, on the other hand, it is held, that a decree enforcing a mortgage is a destruction or satisfaction of the mortgage.[3] Thus, where a mortgage stipulated that, upon default, it should only be necessary for the mortgagee to apply for an order to sell the mortgaged premises; such order merges the mortgage, so that it can no longer be made the foundation of a suit, and any further proceedings to enforce the lien must be founded upon the order.[4] And by other judicial proceedings a mortgage is often extinguished. As where the property is sold on execution against the mortgagee, and bought by him at a nominal price.[5] So it is held, (in Pennsylvania,) that a sheriff's sale of mortgaged premises, upon a judgment for interest due on the mortgage debt, the debt not being due, operates as a foreclosure, extinguishes the equity of redemption, transfers the mortgagor's legal estate, and divests the lien of the mortgage. The proceeds are brought into court, subject to such lien, and belong to the mortgagee to the extent of the debt and interest, in preference of creditors whose liens intervene between the mortgage and the judgment.[6] So, in the same State, where a mortgage was made to secure three bonds, payable at different times, and judg-

[1] Hadley *v.* Chapin, 11 Paige, 245.
[2] Couch *v.* Stevens, 37 N. H. 169.
[3] Manigault *v.* Deas, 1 Bai. Ch. 283.
[4] Ayres *v.* Cayce, 10 Texas, 99.
[5] Schnell *v.* Schroeder, 1 Bai. Ch. 334.
[6] West Branch, &c. *v.* Chester, 11 Penn. (1 Jones,) 282. See Kinnaman *v.* Henny, 2 Halst. Ch. 90 626.

ment was recovered upon the first, and the mortgaged premises sold on execution, the last bond not being due; the mortgage was held discharged.[1] So a debtor, whose estate was subject to an attachment, mortgaged it for $3,200. A part of the estate was afterwards set off on execution, in completion of the attachment, and the mortgagor thereupon gave the mortgagee his note for $1,200, secured by a mortgage of personal property. The mortgagee afterwards assigned the former mortgage for $2,000, and the assignee paid the amount of the execution, taking a conveyance from the judgment creditor. The purchaser of the equity of redemption brings a bill to redeem against the assignee of the mortgage. Held, the giving of the note and second mortgage was a payment of the first to the amount of $1,200, and the plaintiff should be allowed to redeem for $2,000 with interest from the time of assignment.[2] So, in *sc. fac.* against A. upon a mortgage, B., a party interested, may file an affidavit of defence, which is a sufficient answer to the suit, setting forth that judgment had been rendered on the mortgage bond, and upon execution personal property sold to an amount equal to the debt, &c., which had been paid to the plaintiff's attorney.[3]

19. And the same effect has been given to legal proceedings connected with the mortgage, where the question has directly arisen upon some form of personal liability, and not upon the security itself. Thus an equity of redemption, sold on execution, was conveyed, by consent of the purchaser, to a third person, he agreeing to pay the purchase-money, and the purchaser to pay the mortgage. The latter took an assignment of the mortgage, with the note, from the holder, who wrote *satisfied* upon the face of the mortgage. The holder of the note then brings an action upon it against the mortgagor. Held, the action could not be maintained.[4] So a mortgagee covenanted with a third person to foreclose the mortgage and give him the benefit of the decree. The

[1] Berger *v.* Hiester, 6 Whart. 210.
[2] Boston Iron Co. *v.* King, 2 Cush. 400.
[3] Fraley *v.* Steinmetz, 22 Penn. 437.
[4] Waddle *v.* Cureton, 2 Speers, 53.

equity of redemption was afterwards sold on execution, and the covenantee became the owner of it, and the mortgagee released to him his title. Held, an extinguishment of the covenant.[1]

20. With regard to the *application* or *appropriation* of payments made by the mortgagor to the mortgagee; it has been held, that the law presumes such payment to be made on account of the mortgage, and throws the burden of proof upon those who allege the contrary.[2] Thus, if a creditor, holding several claims against his debtor, takes from him a mortgage made to the debtor by a third person, as security for one of the claims, which mortgage it is agreed that the debtor shall pay; and he afterwards makes a payment, to be applied to the debt thus secured; such payment is *pro tanto* a discharge of the mortgage, and the creditor cannot afterwards apply it to the other claims, and enforce the mortgage in full against the mortgagor.[3] But, after such payment, the creditor having procured from the debtor other security for the debts generally, but less than the amount of his debts, without that secured by mortgage, and the debtor having absconded; held, the mortgagor could not claim to have this security applied to his mortgage, in preference to the other debts.[4] So, where a mortgage had been foreclosed, and the mortgagee had two executions in his favor, one upon the mortgage, the other upon a general judgment for the same debt, and ordered the whole property to be sold upon the latter; held, the proceeds of the sale should be applied upon the mortgage debt.[5] So where a mortgagee refused to receive a partial payment on the mortgage, but consented to take the sum offered, and hold it till payment of the balance, and then apply the whole to the mortgage; but really applied the sum paid to his own use; held, on a bill to foreclose, this sum should be applied to the mortgage, as of the time when

[1] Savage *v.* Carter, 2 B. Mon. 512.
[2] Tharp *v.* Feltz, 6 B. Mon. 6. See Williams *v.* Thurlow, 31 Maine, 392.
[3] New York Life, &c. *v.* Howard, 2 Sandf. Ch. 183.
[4] Ibid.
[5] Winter *v.* Garrard, 7 Geo. 183.

it was received and used.[1] So two persons held a mortgage, as trustees, upon an undivided half of certain real estate, and one of them, in his own right, a subsequent mortgage upon the same half. In a suit for partition between the owners, a sale was ordered and made; neither the order nor the conditions of sale referring to any incumbrance. The second mortgagee was present at the sale, agreed that the property should be sold free from incumbrance, knew that the purchaser had notice of this agreement, and that the mortgage was to be cancelled, and received one half the proceeds, being the mortgagor's share. He applied a part of the money to the payment of the second mortgage in full, and the balance to the first, leaving a portion of it due. The amount received by him would have paid the first mortgage in full, and a part of the second. Held, parol evidence was admissible of the facts above stated, and the first mortgage was satisfied.[2]

21. Questions of this nature have arisen, where payments have been set up as applicable to the *principal* of the mortgage debt. Thus a mortgage was given, without any accompanying obligation, for the payment of a sum of money in ten years, with interest in three instalments, to be paid in three, six, and nine years, each instalment to be one year's interest of the whole sum. It was also provided, that the mortgagor might pay, at any time within the ten years, such portions of the mortgage money as he shall see fit. A payment having been made generally, more than two years before the first instalment of interest became due, and exceeding the first instalment; held, it must be applied to the principal.[3] So a mortgage was made to a banking company, to secure sums then due and all sums thereafter to become due from the mortgagor to them, on any banking or other account, "so as the whole amount of principal moneys to be ultimately recovered or recoverable by virtue of that security, should not exceed the sum of £5,800, together with interest," with the addition of a power of sale. The mort-

[1] Toll *v.* Hiller, 11 Paige, 228.
[2] Rogers *v.* Rogers, 1 Halst. Ch. 32.
[3] Davis *v.* Fargo, 1 Clark, 470.

gagor built three houses upon the land, which were successively sold to different purchasers, and the prices paid to the company, who credited the mortgagor with them in his account. Held, these sums were recovered by the company by virtue of the mortgage security, and, so far as they were applicable as principal moneys, must be considered as received in discharge of the sum of £5,800, and not on general account.[1]

22. But where funds were put in the hands of a person, by one of several interested in procuring the discharge of a mortgage, to be applied to that purpose, and he agreed so to apply them, the others agreeing to furnish him with the remainder of the necessary funds, but failing to do so; held, those failing to perform, on their part, could not, by a bill in equity, compel such person to apply the funds belonging to others to the discharge of such mortgage.[2] So a mortgage was made to secure $3,000, part of a debt of $10,000. The mortgagor made sundry payments, which were credited in account, generally, neither party having directed any specific application of them. The equity of redemption was seized on execution, appraised at $1, and set off to the judgment creditor, subject to the mortgage. Upon a bill for foreclosure, brought by the mortgagee, the creditor claimed that the payments should be applied to the mortgage, and not the other part of the plaintiff's debt. Held, no such application should be made, as the effect would be to give the premises to the creditor discharged of the mortgage to the extent of the payment, leaving the execution in full force.[3] So, in a suit to foreclose a mortgage, brought after the mortgagee's death, the mortgagor cannot rely upon debts due him from the mortgagee, as payments on the mortgage.[4] So it has been held, that the devisee of an estate in mortgage cannot set off an arrear of interest, due at the death of the mortgagor, against the arrears of interest due upon a legacy from the

[1] Johnson *v.* Bourne, 2 Y. & Coll. 268.
[2] Holden *v.* Pike, 24 Maine, 427.
[3] Chester *v.* Wheelwright, 15 Conn. 562.
[4] Green *v.* Storm, 3 Sandf. Ch. 305.

mortgagee to the mortgagor for life, and not received by the mortgagor, who was an executor of the mortgagee. This decision was made upon the grounds, that the case was to be regarded as it stood at the death of the mortgagor; that the mortgage debt still subsisted, and an adjustment could take place only by a process in court; that, until such adjustment, the debts might be separately assigned; and if the mortgagor had sold the estate, subject to the mortgage, the purchaser could not have claimed such a set-off.[1] And if the owner of the equity delivers to the owner of the mortgage specific articles, to be applied in payment, but afterwards settles the account, takes a note for the property delivered, and negotiates it; the agreement thus to apply the property is hereby rescinded.[2] So the plaintiff was the holder of four notes, amounting to $1,115, indorsed by the defendant for the accommodation of the maker. The notes being due, and the maker indebted to the plaintiff on other accounts, amounting in the whole to $6,137, he gave the plaintiff a new note secured by mortgage, but the original demands were not extinguished, nor the old notes and evidences of debt given up; and it was agreed that they should not be cancelled, except upon certain conditions which were never fulfilled. The defendant having become absolutely liable, the plaintiff called upon him for payment of the notes indorsed by him, and the defendant thereupon gave the plaintiff a mortgage as additional security for the notes. The mortgage given by the maker was then foreclosed, and the premises sold, yielding, after payment of costs, only $2,818. The plaintiff applied this sum to other debts secured by the mortgage, and not to the indorsed notes. The plaintiff then brings a bill of foreclosure for the notes against the defendant. Held, the plaintiff had a right thus to apply the moneys received, and the defendant could not claim to have them applied *pro ratâ*, upon all the debts which made up the note and mortgage of $6,137; and that the defendant was not entitled to a deduc-

[1] Pettat *v.* Ellis, 9 Ves. 563. [2] Deming *v.* Comings, 11 N. H. 474.

tion from the amount due on his mortgage to the plaintiff, on account of the moneys received by the plaintiff.[1]

23. Payment of a mortgage may be proved or disproved by facts and circumstances, as well as by direct evidence. It is said: — "A mortgage, being considered and treated merely as a security for the payment of money, or the performance of some other act, is simply a *chose in action* extinguishable by a parol release, which equity will execute as an agreement not to sue, or by turning the mortgagee into a trustee for the mortgagor; provided it proceeds upon a sufficient consideration. Such a release or agreement may be established presumptively, by showing declarations and acts of the parties inconsistent with an averment of the continued existence of the mortgage, and repugnant to the rights and liabilities created by it, as well as by express proof. It is for a jury under proper directions to determine the degree of weight that ought to be accorded to the facts proved."[2] Thus in an action for foreclosure, the tenant, for the purpose of proving payment of the mortgage debt, offered evidence to show, that for several years after the date of the mortgage the mortgagor occasionally worked for the demandant. Held, for the purpose of rebutting this evidence, the demandant might prove that the mortgagor was poor, and dependent on his earnings for the support of himself and his family, and that the demandant was accustomed to pay all his laborers at short and stated periods.[3] So, if a mortgagor deliver to the mortgagee specific articles, to be applied in discharge of the debt; it may be shown that he afterwards settled the account, took a negotiable note for the balance due, and negotiated it, and thereby rescinded the contract, so as to preclude himself from setting it up in defence to a suit on the mortgage, as a redemption or payment.[4] But the retaining of mortgaged property after the law-day has passed does not authorize a pre-

[1] The Stamford, &c. *v.* Benedict, 15 Conn. 437.

[2] Per Bell, J., Ackla *v.* Ackla, 6 Barr, 230, 231. See Hemmenway *v.* Bassett, 13 Gray, 378; Richmond, &c. *v.* Woodruff, 8 Gray, 447.

[3] Waugh *v.* Riley, 8 Met. 290; Morgan *v.* Davis, 2 Har. & McH. 17, 18.

[4] Deming *v.* Comings, 11 N. H. 474.

sumption of payment.[1] And where a mortgage itself shows no payment of interest, the presumption is, that none has been made.[2] So the fact, that advances by a father-in-law to his son-in-law had been made for a long time, and were not evidenced by any writing, might authorize a jury to presume that they were not meant to be repaid, and therefore no consideration for a mortgage; but do not raise a presumption of law that the mortgage had been satisfied.[3]

24. If a tenant in fee simple or fee tail pay off a charge on the estate, the payment is *primâ facie* presumed to be for the benefit of the estate. If a tenant for life does it, he is *primâ facie* entitled to the charge for his own benefit. But in either case the presumption may be rebutted.[4]

25. Delivery to the mortgagor, or possession by the mortgagor, of the notes secured by the mortgage, is *primâ facie* evidence that they have been paid by him.[5] And a note and mortgage will be held satisfied, where they have been returned to the mortgagor, under circumstances which show this intention, although under protest re-delivered to the representative of the mortgagee. Thus, a father, who had made advancements to his other children, conveyed land to his sons A. and B., taking from them a note and mortgage, to operate as a check upon their conduct, and not to be collected, intending the land as a gift, subject to the support of himself and wife. A. and B. supported their parents during their joint lives; and a few days before his death the father delivered the mortgage and note to B., saying that he wished him to keep them till he, the father, and the mother were dead, and then the mortgage would be void. He had often said he did not wish A. and B. to pay anything for the land, but only to support their parents. Subsequently the note and mortgage were demanded of B. by the father's administrator, and delivered up by B. under protest; and the administrator filed his

[1] Steele *v.* Adams, 21 Ala. 534.
[2] Olmsted *v.* Elder, 2 Sandf. 325.
[3] McIsaacs *v.* Hobbs, 8 Dana, 268.
[4] Coote, 464. See Brooks *v.* Harwood, 8 Pick. 497.
[5] 15 N. H. 55; Johnson *v.* Nations, 26 Miss. 147.

bill for the foreclosure of the mortgage. Held, that the bill would not lie.[1] So, where a mortgage note is found among the papers of the mortgagor after his death, payment is presumed, although his heirs have in ignorance of the fact brought a bill for redemption against the heirs of the mortgagee, and, by a settlement, the note has been given up to the latter.[2]

26. But the presumption of payment may be rebutted by evidence that the mortgagee, supposing erroneously that the mortgage was foreclosed, and that the mortgagor was entitled to the notes, delivered them to him without payment; this not being a *mistake of law*.[3] So the presumption, arising from such possession by the mortgagor or those claiming under him, is a presumption of fact and not of law, and will be rebutted by any other evidence. Thus, in a suit by the assignee of the mortgage against a mortgagor in possession, the production of the mortgage notes by the tenant does not raise a presumption of payment, no discharge being shown, and the facts strongly tending to prove that the notes could not have been paid to a lawful holder, and an assignee of the mortgage.[4] So the words, written on the face of a mortgage note, "cancelled by A. B.," (the holder of the note,) do not defeat the mortgage in the hands of an assignee of A. B., as against a subsequent mortgagee.[5] So, where there is an intervening title, and a quitclaim deed given; there is no merger, although the mortgage note be given up.[6] So a mortgagee, upon receiving certain property from the mortgagor, which was subject to the lien of executions, gave up the mortgage to him. Before the property could be sold, the executions were levied upon it. Soon afterwards the mortgagor paid them off, but did not redeliver the property to the mortgagee. Held, no payment of the mortgage.[7] So, where a mortgage has been lost, equity will decree that a new one be made.[8] So where

[1] Sherman *v.* Sherman, 3 Ind. 337.
[2] Richardson *v.* Cambridge, 2 Allen, 118.
[3] Smith *v.* Smith, 15 N. H. 55.
[4] Crocker *v.* Thompson, 3 Met. 224.
[5] Bell *v.* Woodward, 34 N. H. 90.
[6] New England, &c. *v.* Merriam, 2 Allen, 390.
[7] Sherwood *v.* Elslow, 5 Ind. 218.
[8] Lawrence *v.* Lawrence, 42 N. H. 109.

the mortgage has been fraudulently taken from the mortgagee, he may still foreclose without giving a bond of indemnity.[1] So an entry of satisfaction, under seal and on record, of a mortgage, is *primâ facie* evidence only of payment of the debt as between the original parties; and proof of subsequent payment of interest, and of retaining the bond, is competent to rebut the presumption of payment.[2] So the mere neglect to foreclose a mortgage, for four years after it falls due, is not conclusive ground for assuming, in favor of purchasers of the mortgagor's interest, the payment of the debt, or that it is barred by the statute of limitations.[3]

27. If a suit for foreclosure has been commenced, and dismissed for want of prosecution, and the dismissal long acquiesced in, satisfaction of the mortgage will be presumed.[4]

28. Both in law and equity, *parol evidence* is admissible of the discharge of a mortgage debt, and thereby of the mortgage itself. (*k*) It is held, that the provision of the statute of frauds, requiring a writing to pass any interest in real estate, does not apply to conditional estates, held by way of security, which are merely incident to the debts secured, and follow as a matter of course any discharge of such debts. In law, the interest in the land is thereby defeated; in equity, a trust arises for the mortgagor, which also, being *implied*, is within the exception of the statute of frauds. Payment of the debt is held a good defence to an ejectment upon the mortgage, more especially in the case of ancient mortgages. The law allows proof of any declarations, acts, or circumstances, inconsistent with a continuance of the lien.[5] So, on the other hand, where an action is brought upon a mortgage against one who is not a party to it, and certain indorsements appear upon the mort-

[1] Massaker *v.* Mackerley, 1 Stockt. 440.
[2] Fleming *v.* Parry, 24 Penn. 47.
[3] Ware *v.* Bennett, 18 Tex. 794.
[4] Nelson *v.* Lee, 10 B. Mon. 495.
[5] Richards *v.* Tims, Barn. 90; 1 Pow. 143 a.; Wentz *v.* Dehaven, 1 S. & R. 312; Den *v.* Spinning, 1 Halst. 471; Harrison *v.* Eldridge, 2, 407; Morgan *v.* Davis, 2 H. & McH. 9; Ackla *v.* Ackla, 6 Barr, 288; Hemmenway *v.* Bassett, 13 Gray, 378; Howard *v.* Gresham, 27 Geo. 347.

(*k*) As to payment by mistake, see Peters *v.* Florence, 38 Penn. 194.

gage note, the plaintiff may offer parol evidence to explain them, or to show that they were made by mistake, unless at the time of purchasing the property the defendant had notice of such indorsements, or made inquiry of the plaintiff as to the amount due on the mortgage. Such indorsements are mere receipts.[1] So, where a mortgagor went to the mortgagee's house with a box containing the bond and mortgage, and offered them to him; but he put back the deeds, saying, "take back your writings, I freely forgive you the debt," and then, speaking to the mortgagor's mother who was present, said: "I always told you I would be kind to your son; now I am as good as my word;" held, this evidence was competent to prove a discharge of the mortgage.[2] So an agreement between mortgagor and mortgagee that the land shall be sold, waiving the lien of the mortgage, which is to be paid from the proceeds, is valid; and the mortgagee has a prior claim upon such proceeds.[3] (*l*) So the plaintiff was assignee of a mortgage; the defendants assignees of the equity of redemption. Pending a suit for the mortgaged premises, the defendants, by their agent, offered to the plaintiff a sum of money in satisfaction of the mortgage. The plaintiff, not being certain at the time how much was due, said that he would take the amount offered and apply it to the debt; but the agent said that he had no authority to deliver the money except in full satisfaction, and, if the plaintiff took it, he must take it upon those terms. The plaintiff took it, being advised by counsel, in the presence of the agent, that he would still be entitled to any balance. Held, he could not maintain a bill to foreclose, although the amount due considerably exceeded the amount received.[4]

29. But it is no defence to a suit for foreclosure brought by

[1] McDaniels *v.* Lapham, 21 Verm. 222.
[2] Richards *v.* Syms, Barnard. 90.
[3] Baker *v.* Wimpee, 22 Geo. 69.
[4] McDaniels *v.* Bank, &c. 3 Wms. 230.

(*l*) As to the party authorized to receive payment, see Richardson *v.* Brooklyn, 34 Barb. 569.

executors, that the mortgagee sent letters to the owner of the equity of redemption, promising that his executors should cancel the mortgage, and containing words of gift.[1] So it is not a good defence to a bill for foreclosure, that the plaintiff told the defendant he did not wish him to pay any more of the principal when due, but only the interest, unless the plaintiff needed the principal, and gave timely notice. Such promise is void for want of consideration.[2] So the purchaser of an equity of redemption may maintain an action against his grantor to foreclose the mortgage; though he had previously agreed that the grantor might use his name to resist such foreclosure.[3]

30. It has been a subject of much discussion, what is the precise remedy of the mortgagor to regain his estate, where the debt is paid after condition broken, and consequently the legal title absolutely forfeited. (*m*)

31. Where the debt is paid after breach of condition, it was early held in Massachusetts,[4] that the only remedy of the mortgagor, to regain possession, was a bill in equity, and an action at law would not lie. A statute of that State provided for the discharge of a mortgage, after payment, upon the record; thus implying that the mortgagee still retained the legal title. Moreover, a bill in equity is regarded as an adequate and convenient remedy, and well adapted to do justice to all parties; at once securing the rights of the mortgagee, and moderating the rigor of the common law for the benefit of the mortgagor. It is as beneficial to the mortgagor as a

[1] Scales *v.* Maude, 35 Eng. Law & Eq. 320.
[2] Massaker *v.* Mackerley, 1 Stockt. 440.
[3] Brolley *v.* Lapham, 13 Gray, 294.
[4] Hill *v.* Payson, 3 Mass. 560; Parsons *v.* Welles, 17 Mass. 419; Sherman *v.* Abbot, 18 Pick. 448.

(*m*) By St. 7 Geo. 2, ch. 20, a mortgagee cannot maintain ejectment after payment or tender of the debt and cost; but is required to reassign, and give up all deeds, &c. 1 Pow. 168. It is held in the United States Court, that, after discharge of a debt secured by mortgage, the mortgagee becomes a trustee for the mortgagor, and a court of equity will enforce a reconveyance. Upham *v.* Brooks, 2 W. & M. 407.

suit at law, and may sometimes be more so; because, in case of a want of evidence of payment, the mortgagee may be put upon his oath. It is certainly more beneficial to the mortgagee. In case of an action at law against him, he could obtain no allowance for *repairs*, which depends either upon express statute or the rules of equity. The common law recognizes no such claim, but considers the mortgagee as absolute owner.

32. The same doctrine has been recognized in much later cases.[1] And it has also been held, by a *reverse* application of the same general principle, that, in an action for possession by a mortgagee, the tenant cannot plead a tender after breach of condition, but before suit brought. Nor a promise by the mortgagee, that he should hold the land free of the mortgage.[2]

33. So in Maine, a mortgagee who has entered for breach of condition, or those claiming under him, cannot be ousted by the mortgagor at law, after payment of the debt. The remedy is in equity.[3] And the rule is held applicable to one claiming under a warranty deed from the mortgagee, made after entry.[4] (*n*)

34. So it is held in Connecticut,[5] that where payment is made after the *law-day*, neither the mortgagor nor his assignee can maintain ejectment against the mortgagee, without obtaining the legal title; nor can the mortgagor defend against an ejectment by the mortgagee or his assignee. (*o*)

[1] Cutler *v.* Lincoln, 3 Cush. 128; Pearce *v.* Savage, 45 Ib. 90; Pratt *v.* New England, &c. *v.* Merriam, 2 Allen, 390.
[2] Maynard *v.* Hunt, 5 Pick. 240.
[3] Wilson *v.* Ring, 40 Maine, 116; Scholfield, Ib. 386.
[4] Hill *v.* More, 40 Maine, 515.
[5] Doton *v.* Russell, 17 Conn. 146; Cross *v.* Robinson, 21 Ib. 379.

(*n*) In Wisconsin, a mortgagor cannot maintain ejectment against a mortgagee lawfully in possession after condition broken. And the purchaser at the foreclosure sale has as much right as the mortgagee; or all the rights of all the parties to the suit. The mortgagor's only remedy is to institute proceedings for redemption. Gillett *v.* Eaton, 6 Wis. 30; Tallman *v.* Ely, Ib. 244.

(*o*) In Connecticut, in the case of Smith *v.* Vincent, 15 Conn. 13, Wil-

35. And it was formerly held, in New York,[1] that tender of the debt after breach of condition does not operate as a discharge of the mortgage; although, where a mortgagee has received an equitable satisfaction, if he afterwards attempt to set up the mortgage as a subsisting lien, satisfaction may be decreed, so that it may be cancelled on the record.[2] But later cases hold, that a tender of the debt after the day of payment removes the lien of the mortgage as effectually as a tender before the day; and the mortgagee, if in possession, may be ousted by the mortgagor. So payment, though after the day, revests the title.[3] In a still more recent case it is held, that after breach of condition ejectment cannot be maintained against the mortgagee.[4]

36. In Mississippi, where there has been a payment, but no satisfaction on record, or other extinguishment of the mortgage, a sale upon execution of the mortgagor's estate will pass only an equitable title, to be enforced in a court of equity, but not by ejectment.[5] Payment of the debt does not revest the title in the mortgagor at law.[6]

37. In New Hampshire, in a recent case, it has been decided that payment of the debt, or performance of the

[1] Post *v.* Arnot, 2 Denio, 344; Merritt *v.* Lambert, 7 Paige, 374.
[2] Kellogg *v.* Wood, 4 Paige, 578. See Jackson *v.* Craft, 18 Johns. 110.
[3] The Farmers', &c. *v.* Edwards, 26 Wend. 541; Rogers *v.* De Forest, 7 Paige, 272.
[4] Bolton *v.* Brewster, 32 Barb. 389.
[5] Wolfe *v.* Dowell, 13 Sm. & M. 103.
[6] Smith *v.* Otley, 26 Miss. 291.

---

liams, C. J., adverts to the New York decisions, but considers the rule as established the other way by the cases of Phelps *v.* Sage, 2 Day, 151, and Roath *v.* Smith, 5 Conn. 136, which are not controlled by Porter *v.* Seeley, 13 Conn. 564. This last case he considers as merely deciding, that one without shadow of title in the debt or the land, a mere stranger, cannot protect himself by a satisfied mortgage. Hence it was decided, that the title of a mortgagee, under a mortgage, satisfied after forfeiture, may be set up as a defence to an action of ejectment. In Sage *v.* Phelps, 2 Day, 151, above referred to, it appeared that the plaintiff, in an action of ejectment, claimed under a mortgage, and the defendant under a subsequent absolute deed, from the same person. The defendant offered to prove, that, after the expiration of the law-day, the whole mortgage-money was paid to the plaintiff's satisfaction. Held, the evidence was inadmissible.

duty, secured by the mortgage, discharges the interest of the mortgagee, and revests the estate fully in the mortgagor.[1]

38. But a later case holds, that a mortgagor, or his assignee, of a subsisting mortgage, cannot maintain a real action against the mortgagee or his assignee.[2] So, in Maryland,[3] it is held, that full payment of the principal and interest due upon a mortgage, and the receipt thereof in satisfaction by the mortgagee, though after the day of payment mentioned in the mortgage, discharges the mortgage, and defeats the estate of the mortgagee in law and equity; so that no title under the mortgage can afterwards be set up as a defence to an ejectment for the land. And where, in an action of ejectment by a mortgagee against an assignee of the mortgagor, it appeared that the debt and interest had been paid in continental bills, which were received by the mortgagee in discharge of the mortgage, and that the original mortgage and bond were delivered up, with a receipt in full thereon; but that no release of the lands had been executed; judgment was rendered for the defendant.[4]

39. So, in South Carolina, in case of a mortgage to secure repayment of a legacy, if the payment should prove invalid; judgment being rendered in favor of such payment, held, the mortgage was *functus officio*, and could not be enforced by an assignee.[5]

40. And the same general doctrine is held by the Court in Ohio, with reference to the discharge or extinguishment of a mortgage: "If we look at the true nature of the contract, and view the mortgage as it really is, a mere security for a debt; if the debt is the principal and the mortgage the incident; there certainly, as it appears to me, can be no good reason why a discharge of the debt should not be held to be a discharge of the mortgage, and put an end to the interest of the mortgagee in the land. Such was said by this Court

[1] Furbush *v.* Goodwin, Law Rep. 1855, March, p. 650.
[2] Johnson *v.* Elliot, 6 Fost. 67.
[3] Morgan *v.* Davis, 2 Har. & McH. 17.
[4] Paxon *v.* Paul, 3 Har. & McH. 399.
[5] Rickard *v.* Talbird, Rice, Ch. 158.

to be the case in Hill *v.* West, 8 Ohio, 222, and we are disposed to adhere to the opinion therein expressed. We are aware that this is contrary to the old doctrine upon the subject, but we believe it is in conformity with reason, and with modern decisions. 4 Kent Com. 193. Nor does this opinion conflict with the statute of the 22d of February, 1831, pointing out the manner in which satisfaction of a mortgage may be entered." [1] So, in Kentucky, in the case of Breckenridge *v.* Ormsby,[2] Robertson, J., says: "A payment of the mortgage debt extinguishes the mortgage, at law, as well as in equity. It is not doubted that a payment of the debt, before forfeiture, extinguishes the mortgage at law. But there are many learned Judges who doubt whether a payment after forfeiture will have the same effect. On this point there is great diversity in the cases reported, as well as in the '*auctoritas prudentum.*' But ever since the days of Hardwick, the opinion has grown more and more prevalent, that a payment, at any time before the title has been passed to the mortgagee by a decree or sale, will *per se* at law, as it will in equity, divest the mortgagee of all title."

41. The cases relating to this question seem generally to take for granted, that the denial of the right of possession or of action to one of the parties necessarily implies the existence of the same right in the other. Thus in the case, in Massachusetts, of Hill *v.* Payson,[3] above cited, it seemed to be conceded by the Court, as an inference from the doctrine therein established, or as the *converse* of that doctrine, that after payment the *mortgagee* might recover the land by an action at law from the mortgagor; notwithstanding the apparent hardship and injustice of such a proceeding. But in the much later case of Wade *v.* Howard, the Court remark,[4] that this concession was inadvertently made, and distinctly decide, that the mortgagee cannot thus recover, because the only judgment, which the law in such case would authorize,

[1] Per Hitchcock, J., Perkins *v.* Dibble, 10 Ohio, 440.
[2] 1 Mar. 257, 258.
[3] 3 Mass. 560.
[4] 11 Pick. 297; acc. Hadlock *v.* Bulfinch, 31 Maine, 246; Webb *v.* Flanders, 32, 175.

is a *conditional* one, that a writ of possession shall issue, *unless the debt is paid within a certain time;* which, under the circumstances, would be absurd; it having been already paid. So, in Maine, no action can be sustained on a mortgage, after the mortgage debt has been paid.[1] So, in Mississippi, a bill to foreclose presents a question of title, and the mortgagor may show that the mortgagee's title, though absolute at law, has been extinguished in equity by payment.[2] And Judge Story says:[3] "Unless the mortgagor can resist a recovery by the mortgagee at law, he may be turned out of possession when nothing is due on the mortgage, against the plainest principles of justice, and be driven by a circuity of action to enforce his acknowledged rights. If a cent only be due on the mortgage, the mortgagee can obtain no judgment at law in his suit, but a conditional one, and no possession at all if that cent is paid; and yet, if nothing is due, his rights are absolute, and he is entitled to an unconditional surrender of the possession. I confess I do not understand the reasoning upon which such a distinction can be maintained." (*p*) It has been held, however, in Massachusetts, that an action for *forcible detainer* may be maintained upon a mortgage, which was paid after condition broken. The objection already referred to, that the judgment must be conditional, does not apply to such an action.[4]

42. A mortgage may be extinguished, not only by payment of the debt, but by a subsequent direct transfer of the estate itself from one to the other of the parties. Of course, as will be more fully seen hereafter, (§ 49,) this result follows from an express relinquishment of title by the mortgagee; but it may equally be produced, by a conveyance or release from

[1] Williams *v.* Thurlow, 31 Maine, 392.
[2] Wilkinson *v.* Flowers, 37 Miss. 579.
[3] Gray *v.* Jenks, 3 Mas. 527.
[4] Howard *v.* Howard, 3 Met. 557. See Gerrish *v.* Mason, 4 Gray, 432.

(*p*) The doctrine of the text is said to be adopted in Maine, Massachusetts, Maryland, New York, Vermont, New Jersey, Pennsylvania, and Ohio. But it is held otherwise in Connecticut, Kentucky, and Virginia. 2 Greenl. Cruise, 122, n.

the mortgagor to the mortgagee, the effect of which is to vest in the latter an interest inconsistent with, or repugnant to, his claim under the mortgage. Thus the mortgagor may convey or release his estate to the mortgagee, after maturity of the debt, in satisfaction thereof, unless the transaction be fraudulent;[1] or unless intention, incapacity to elect, or interest in the mortgagee to keep the security alive, prevent this result.[2] Though, it is said, equity looks with suspicion on such a transaction, in reference to an extinguishment of the mortgage.[3] And where the equity of redemption is conveyed by quitclaim deed to a person previously holding a mortgage on the same estate, the estate will not be merged, contrary to a declaration in the deed, that such deed should not operate as a merger, except at the election of the grantee without evidence of such election.[4] But where a devisee in trust with power to sell, for valuable consideration paid by a mortgagee, after the condition had been broken, "forever quitclaimed all the estate, right, title, &c., at law as well as in equity, in possession as well as in expectancy," describing the premises; held, the equity of redemption passed;[5] though it was further held, that the mortgagee might still maintain a bill to foreclose, in order to quiet his title.[6] So where the heirs of a mortgagee were in possession of an ancient deed, releasing the equity of redemption, such deed, even though not recorded, was held to preclude a redemption by a subsequent purchaser.[7] So, where a mortgagee purchases and takes a deed of the mortgaged premises, paying a part of the consideration by the mortgage note; such mortgage is thereby paid off and extinguished, in law and equity, although uncancelled on the record.[8] And a conveyance from

[1] Shelton *v.* Hampton, 6 Ired. 216; Harrison *v.* The Trustees, &c., 12 Mass. 465; Jackson *v.* Tift, 15 Geo. 557; Gale *v.* Mensing, 20 Mis. 461; Snyder *v.* Snyder, 6 Mich. 470, (a strong case against merger.)

[2] Waugh *v.* Riley, 8 Met. 290; Knowles *v.* Lawton, 18 Geo. 476; Vannest *v.* Latson, 19 Barb. 604.

[3] Hitchcock *v.* United States, &c., 7 Ala. 386.

[4] Spencer *v.* Ayrault, 10 N. Y. (6 Seld.) 202.

[5] Hitchcock *v.* United States, &c., 7 Ala. 386.

[6] Ibid. *contra*, Ormsby *v.* Phillips, 4 Dana, 232.

[7] Mallory *v.* Aspinwall, 2 Day, 280.

[8] Jennings, &c. *v.* Wood, 20 Ohio, 261. Spalding, J., dissenting.

the mortgagor to the mortgagee may enure to the benefit of a previous grantee of the former. Thus a mortgagor, having conveyed the land to a third person, afterwards conveyed it to the mortgagee, who entered satisfaction of the mortgage. Held, the former grantee thus gained the absolute legal title.[1]

43. While a quitclaim deed from mortgagor to mortgagee is held to be a merger of the mortgage; a quitclaim deed of *part* of the mortgaged premises to the mortgagee or his assignee does not wholly extinguish it, but at most for only a proportional part of the debt;[2] although the assignee's title to the half in question was derived from one who had purchased it from the mortgagor, and given back an agreement to pay off the mortgage; especially if the assignee had no notice of the agreement.[3] So a mortgagee, by the purchase of a part of the mortgaged premises in payment of a debt not secured thereby, does not prejudice his mortgage in respect to the residue.[4] (*q*)

[1] White *v.* Todd, 10 Mis. 189.
[2] Klock *v.* Kronkhite, 1 Hill, 107; James *v.* Morey, 2 Cow. 246.
[3] Ibid.
[4] Stover *v.* Harrington, 7 Ala. 142.

(*q*) Two tenants in common mortgaged to two other persons, and their equity of redemption was afterwards sold on execution. The mortgagees recovered a judgment for possession, and subsequently one of them transferred all his title to the execution purchaser, who conveyed one half of the right in equity, sold on execution, to another person. Subsequently, possession was delivered to the mortgagees upon their execution. Afterwards, the execution purchaser conveyed to the mortgagee, who had not parted with his interest, all his title, thus uniting in the latter the rights of mortgagor and mortgagee of half the land. This conveyance was treated by the grantee of the execution purchaser as payment of half the debt; and, having tendered the balance, he brings a bill in equity to redeem against the mortgagee last referred to. Held, as the defendant purchased only a moiety of the equity of redemption, only a moiety of the mortgage was extinguished; that the recovery of a judgment upon the mortgage by the mortgagees, being previous to the defendant's acquiring any title to the equity, did not indicate his intention as to an extinguishment or otherwise; and, as the defendant would gain nothing by keeping alive a moiety of the mortgage, it was held to be extinguished. Freeman *v.* Paul, 3 Greenl. 260.

In May, 1836, A., owning land in Michigan, gave a bond and a mortgage of it to B., of New York. In March, 1838, B. assigned to C., as security

44. If the mortgagee purchase the land at a judgment sale, this wholly extinguishes the mortgage, where the sale is made in favor of a third person; and where it is founded upon a judgment for the mortgage debt, to the amount which he gives for the land.[1] (*r*)

45. A mortgage will not be extinguished by the mortgagee's receiving an absolute conveyance, unless the two titles become thereby united in him at the same time. Thus, in 1821, Reuben Sherman conveyed the demanded premises to Reuben Sherman junior, taking back a mortgage for the whole or a part of the price. August 25, 1828, the mortgagor conveyed to the demandant; the deed being recorded on the 30th of August. Before this conveyance,

[1] Speer *v.* Whitfield, 2 Stock. 107.

---

for a debt. After breach, C., with the debtor's assent, assigned the bond and mortgage to D., as security for a note on which both were liable. After breach in this case, D. sold to E., who sold to F. F. received from A. a deed of the land, and cancelled the bond. After C.'s claim had become absolute, B., having become insolvent, assigned to G., who had been appointed receiver, under the statute of New York. Of this D. knew nothing when he purchased. As soon as he was informed of it, he requested G. to redeem, by paying the debt, but G. refused, and authorized D. to dispose of the bond and mortgage. Held, that G., by the assignment to him, took an interest in the bond and mortgage; that the conveyance from A. to F. operated as a merger of the mortgage; that neither the mortgage nor the land, when held by F., was subject to any claim of G.; and that all holding the land under F. held it free of all and any prior equity of G. Graydon *v.* Church, 4 Mich. 646.

If the owner of an equity of redemption, not being the mortgagor, convey with warranty, afterwards take an assignment of the mortgage, and reassign it to a *bonâ fide* purchaser; he is held to have taken the assignment for the benefit of his grantee; hence the mortgage is extinguished. Mickles *v.* Townsend, 18 N. Y. 575.

(*r*) But where, at a sheriff's sale under a second mortgage, the lands were purchased in his own right by the executor of the first mortgagee; held, this purchase did not necessarily operate as a merger and extinguishment of the first mortgage, but its effect depended on the intention of the purchaser. Also, that the mortgage might be extinguished as to only a part of the premises. Clift *v.* White, 2 Kern. 519.

Sherman senior mortgaged to the tenant, but the mortgage was not recorded till after registration of the demandant's deed. Subsequently, the tenant and Sherman senior conveyed to Samuel Sherman, and Samuel to the tenant. Held, as the mortgage from Sherman junior to Sherman senior was recorded before the conveyance to the demandant, this conveyance passed to him only the equity of redemption; and that the conveyance from the tenant and Sherman senior to Samuel did not operate as an extinguishment of the mortgage from Sherman junior because Samuel did not have his title as mortgagor, which was then vested in the demandant. And if this conveyance to Samuel did extinguish the mortgage from Sherman senior to the tenant, it was immaterial, for then Samuel took the legal estate from the other grantor, and the tenant then derived the legal estate from Samuel, and therefore this action could not be maintained, the demandant acquiring, by payment of the debt, a mere equitable title.[1] So in Pratt *v.* Bank, &c.[2] Whiton mortgaged to Hinsdell, who assigned to the plaintiffs. Afterwards the mortgagor, by a quitclaim deed, released to the mortgagee, and the mortgagee mortgaged to the defendants. Upon a bill for foreclosure, held, the mortgage title, by these transactions, had not merged in the fee. There can be no merger, unless the two estates unite in one and the same person, and in the same right. Upon the assignment of the mortgage to the plaintiffs, they became mortgagees, and Whiton mortgagor, and Hinsdell had no estate of any kind in the land. When the mortgagor assigned his equity to Hinsdell, the latter acquired his rights, the plaintiffs having those of the mortgagee. As the assignment by the mortgagee to the plaintiffs was prior to the release by the mortgagor to him, the estates of the mortgagee and mortgagor never became united in the mortgagee, and, not subsisting at any time in one person, could never unite and merge in the fee.

[1] Sherman *v.* Abbot, 18 Pick. 448.

[2] 10 Verm. 293.

46. A mere conveyance to the mortgagee will not affect the mortgage, without evidence of a delivery and a claim under such conveyance, nor without the mortgagee's assent thereto.[1] Thus a mortgage was made by an inhabitant of New Jersey to an inhabitant of New York, of lands in the former State, as security for a bond. Subsequently, the mortgagor for his own purposes executed and caused to be recorded, in New Jersey, a deed of the land to the mortgagee, to which the latter never assented. The mortgagee having assigned the bond and mortgage, with all his other property, for the benefit of his creditors; a creditor attached the land. Held, the deed did not extinguish the mortgage, and the latter should prevail over the attachment.[2]

46 *a*. If a debt is secured by a mortgage and also by a surety, the mortgage will not be extinguished by the mortgagee's purchasing the equity of redemption, with the *bonâ fide* purpose of benefiting the surety.[3]

47. If a mortgagor make a fraudulent conveyance to the mortgagee, the mortgage note being given up, and the amount of it included in the sum intended to be secured by such conveyance; the mortgage is not extinguished, but, when the conveyance is avoided by creditors, revives, subject only to the amount for which the deed was given fraudulently.[4]

48. If an equity of redemption is attached, an assignment of the mortgage to a purchaser of the equity of redemption does not extinguish the mortgage. The attachment prevents the estates from coalescing.[5]

49. A mortgage will of course be extinguished by a direct release or discharge, which may be in the form of a separate deed, or, as is more commonly the case, written upon the back of the mortgage deed itself, and acknowledged and recorded like other transfers of real estate. So a receipt in

[1] Waugh *v.* Riley, 8 Met. 29; 1 Halst. Ch. 43.

[2] Longstreet *v.* Shipman, 1 Halst. Ch. 43.

[3] Cullum *v.* Emanuel, 1 Ala. (N. S.) 23.

[4] Ladd *v.* Wiggin, 35 N. H. 421.

[5] Grover *v.* Thatcher, 4 Gray, 526, (affirming the "elaborate opinion" in Hunt *v.* Hunt, 14 Pick. 374.)

full of the mortgage debt is an equitable release of the mortgage.[1] So a mortgage, though under seal, may be released by a parol agreement, without payment.[2] (*s*) But where two mortgagees gave to the mortgagor a release, reciting payment in full of the debt; and, the same day, the latter gave a mortgage to one of the mortgagees; held, the release could not be explained by parol evidence, and that an incumbrance between these two mortgages should have priority.[3] So where a mortgagee executes an instrument in these words: "This mortgage is discharged, a second mortgage having been given of other lands to secure the same debt;" such instrument cannot affect the mortgagee's rights, unless he be chargeable with fraud, which is affirmatively proved against him.[4]

50. In general, a quitclaim deed from the mortgagee or his assignee to a purchaser of the equity of redemption extinguishes the mortgage.[5] Thus A. sold to B., with covenants for quiet enjoyment and against incumbrances, and took a mortgage back for the purchase-money. At the same time there was a judgment against A., which was a lien on the premises, and under which they were sold and ultimately conveyed to C. C., on the same day that he took a deed from the sheriff, executed a deed of release and quitclaim to B., being at the same time the holder of the mortgage. Held, C. could not foreclose the mortgage.[6]

51. But where a conveyance from the mortgagee to the purchaser of the equity of redemption concluded thus, — "meaning hereby to convey all the right, title, and interest now vested in me, by virtue of any and all conveyances here-

[1] Marriott *v.* Handy, 8 Gill, 31.
[2] Wallis *v.* Long, 16 Ala. 738.
[3] Woollen *v.* Hiller, 9 Gill, 185.
[4] Gates *v.* Adams, 24 Verm. 70.
[5] Jerome *v.* Seymour, Harring. Ch. 357.
[6] Woodbury *v.* Aikin, 13 Ill. 639.

(*s*) A mortgagee, with notice that a prior mortgage has been improperly discharged without being satisfied, takes no better title than his mortgagor. Morgan *v.* Chamberlain, 26 Barb. 163.

tofore made to me by" the mortgagors; held, these words showed no intention to discharge the mortgage, but the reverse.[1]

51 *a*. A release executed by A., a *cestui que trust*, to B., of all claims or demands of every nature which C., the trustee, who is in possession of the legal estate, has against B., on account of a mortgage executed by B. to the trustees, is not a conveyance of the estate of C., and is not therefore a compliance with an agreement to convey the interest of C., the trustee.[2] So A., holding a mortgage upon several lots of land belonging to B., to secure a debt of $900, executed a release to B. of all claims and demands whatever, in consideration of the conveyance of a lot of land valued at $200; but the mortgage debt was not due at the time, and the mortgage was not delivered up or cancelled. Held, the mortgage debt was not affected by the release.[3]

52. A bond of indemnity may sometimes operate as a release. Thus the grantee of a mortgagor, being about to sell, procured from the mortgagee to the purchaser a bond, conditioned that the grantee should save the purchaser harmless from all cost and damage in consequence of any previous incumbrance. Held, the effect was to release the land from the mortgage.[4] So A. mortgaged land to B., and then conveyed the land, subject to the mortgage, to C. C. conveyed the land, with warranty, to D., and D., with similar covenants, to E., having first procured B. to execute a bond to E., conditioned that D. should save E. harmless from any incumbrance, the parties understanding and intending that this would discharge the land from the mortgage, but would leave B. the right to pursue his remedy against A. for his debt, and also to hold C. and D. upon their warranty, and to prosecute suits thereon in the name of E., but for his own benefit. Held, the bond discharged the incumbrance, and consequently released C. and D. from their covenants, so far as the

[1] Pool *v.* Hathaway, 9 Shepl. 85.
[2] Simonton *v.* Gandolfo, 4 Florida, 209.
[3] McIntyre *v.* Williamson, 1 Edw. Ch. 34.
[4] Proctor *v.* Thrall, 22 Verm. 262.

mortgage was concerned, and that chancery could grant no relief.[1]

53. Where the purchaser of part of a lot of land, subject to a mortgage, paid the purchase-money to the mortgagee, and took a release of his land from the mortgage; held, that portions of the land, previously sold, were not thereby discharged.[2]

54. Where a release of a mortgage is made to distinct parties, it will take effect according to their respective interests in the land, independent of the mortgage. Thus, in the case of Baylies *v.* Bussey,[3] a mortgagor and mortgagee joined in a second mortgage. The second mortgagee took possession for breach of condition, but, before the expiration of three years, tendered a release of his mortgage, which the parties refused to receive, till after the lapse of five years. The release was held to reinstate the mortgagor and first mortgagee in the same relative position as if the second mortgage had not been made.

55. Where a creditor agreed to discharge his debtor, upon the fulfilment of a certain agreement by him, under which the debtor's goods were to be surrendered to the creditor, &c., but all remedies on a certain mortgage, given by the debtor and others to secure the debt, were expressly reserved by the same agreement; held, the other mortgagors were not discharged from their liability as sureties.[4]

56. In most of the States, a summary method of releasing or discharging mortgages has been provided by statute; which is, an entry upon the margin of the record in the Registry of Deeds. This mode has probably to some extent superseded the more technical forms of discharge. (*t*)

[1] Proctor *v.* Thrall, 22 Verm. 262.
[2] Evertson *v.* Ogden, 8 Paige, 275.
[3] 5 Greenl. 153.
[4] Clagett *v.* Salmon, 5 Gill & J. 314.

(*t*) In Massachusetts, New Hampshire, Maine, Rhode Island, Vermont, Delaware, New Jersey, Pennsylvania, Alabama, South Carolina, Missouri, the discharge may be made by attorney. (Neither the discharge nor the authority of the attorney need be under seal. Valle *v.* American, &c., 27

57. After assignment, a discharge executed by the mortgagee or his administrator, and recorded without payment

---

Mis. 455. Nor need the payment be in money. Ibid.) In Illinois, Indiana, Michigan, Arkansas, Mississippi, Wisconsin, and Iowa, (the discharge to be attested by the register,) it is provided by statute, that mortgages may be discharged upon the margin of the public record. In Pennsylvania, Missouri, Illinois, Mississippi, and Alabama, the mortgagee shall enter the discharge in three months after demand, (or in Missouri give a release,) under penalty of forfeiting a sum not exceeding the debt. In Michigan, in seven days, under penalty of $100, and all actual damage. In Iowa, within six months, under penalty of $25. In South Carolina, in three months from demand of any one interested in the estate, under penalty of one half of the debt. In Massachusetts and Wisconsin, in seven days from demand. (An action on the case, under Rev. Sts. ch. 59, § 39, for refusal to discharge a mortgage, is a penal action, and calls for a strict construction of the statute. The mortgagor must therefore show full performance of the conditions of the mortgage according to the statute. A verbal agreement to release for less than is due is without consideration, and cannot be enforced. Though the plaintiff purchased the land upon the faith of such an agreement, so that it might be binding in a foreclosure suit, it does not dispense with proof of payment in full, in an action for the penalty under the statute. Stone *v.* Lannon, 6 Wis. 497.) In Vermont, New Hampshire, and Rhode Island, ten days; in Arkansas, sixty days, under a penalty not exceeding the debt; in Delaware, sixty days, under penalty of paying all damage or a fixed sum; with treble costs in Rhode Island. The same provision is made in the last-named State, for refusal to execute a release. But the statute is not to impair the effect of any other legal discharge, payment, satisfaction, or release. In New Hampshire, after payment or tender, the Court may decree a discharge, and a copy of the decree shall be recorded. In Michigan, the mortgagee, before such discharge upon the record, is to give a certificate, which shall be acknowledged, &c., like a deed. Mass. Gen. Sts. 418; Maine Rev. Sts. ch. 89, § 26; 1 Verm. L. 194, 195, (see Ibid. 1837, 6); Verm. Rev. Sts. 316; Gen. Sts. 451; N. H. Rev. Sts. 245, 246; Purd. Dig. 196; Penn. Sts. 1849, 527; Aik. 94; Hutchinson, (Miss.) 611; Wis. Rev. Sts. 330, 331; N. J. Rev. Sts. 659; S. C. St. Dec. 1817, 26; Ind. Rev. L. 272; Ill. Rev. L. 510; Del. Rev. L. 1829, 92; R. I. L. 205, 206; R. I. Rev. Sts. 1857, 340; Mis. St. 409, 410; Mich. St. 1839, 219; Mich. L. 1861, 11; Iowa Rev. Sts. 651; Ark. L. 748. See Phelps *v.* Rolfe, 20 Mis. 479.

It seems, an action lies to cancel a paid mortgage, in order to remove a cloud from the plaintiff's title. But whether this is so where the mortgage is stale, or not asserted, *qu.* Wofford *v.* Thompson, 8 Tex. 222.

and without authority, has no other effect than to cancel the record, and give priority to a subsequent recorded deed.[1]

[1] Ely *v.* Schofield, 35 Barb. 330.

In Illinois, a release by deed, attested by one witness, and legally acknowledged, is also provided. Sts. 1838, 1839, 197.

In Indiana and Wisconsin, the register of deeds may discharge a mortgage, upon the exhibition of a certificate of payment or satisfaction, signed by the mortgagor (mortgagee) or his representative, and attached to the mortgage; which shall be recorded. A like provision is made in New York, Pennsylvania, and Michigan. Ind. St. 1836, 64; 1 N. Y. Rev. Sts. 761; Wis. St. *supra;* Pa. L. 1856, 304; Mich. Comp. L. 1857, 844.

The following points have been decided in New York, in reference to the power of *clerk's in chancery* to discharge mortgages, which have been made for moneys deposited in that court.

Where moneys deposited in the Court of Chancery, in a suit for the partition of lands, have been invested by the clerk upon bond and mortgage executed to him in his official character; such clerk has no power to discharge the mortgage without order of Court. The Farmers', &c. *v.* Walworth, 1 Comst. 433. It seems, where the clerk executes such discharge without actual payment and without order of Court, it is void even as against *bonâ fide* purchasers of the property incumbered by the mortgage. Ibid. But the unauthorized act of the clerk may be ratified by the owners of the fund secured by the mortgage. Ibid. A clerk in chancery loaned upon bond and mortgage a large sum, which had been paid into court to secure a widow's dower, in pursuance of a decree in partition. Afterwards, the borrowers executed to the clerk another bond for the same sum, and another mortgage upon different property. These securities were meant as a substitute for the former ones, and so received by the clerk, who thereupon, without direction from the Court, executed a satisfaction of the first mortgage, which was entered of record. The owners of the fund, after the death of the widow, with notice of all the facts, foreclosed the second mortgage in the name of the clerk, and had the property sold. Held, though the discharge of the first mortgage was void, and might have been so treated, the election of the owners of the fund to proceed upon the second was a ratification of the acts of the clerk, and therefore that a bill did not lie to foreclose the first mortgage, for the purpose of collecting the balance not realized by the first foreclosure. Ibid.

Money was paid into court in a partition suit, and loaned by the clerk on mortgage to A. and others. The lands mortgaged were sold by A. and his co-mortgagors to B., who had notice of the mortgage, and that it was given to the clerk officially, and who reserved on that account a part of the pur-

58. Equity may revive a mortgage, the discharge of which has been procured by fraud of the mortgagor. Thus, having made two mortgages of the same land, the mortgagor procured a discharge of the first by fraudulent representations, and gave a new mortgage, the mortgagee being ignorant of the second incumbrance, but the second mortgagee not being party to the fraud. Held, upon a bill in equity by the first mortgagee, the discharge should be declared void, and a foreclosure decreed.[1] So, where the release of a mortgage is

[1] Barnes *v.* Camack, 1 Barb. 392.

---

chase-money, until the mortgagors should procure a discharge of the mortgage. The mortgage was discharged by the clerk, without an order of the Court, on the giving of a new mortgage by A. and others on other and less valuable lands. A certificate of the discharge was given to B. by the register of deeds where it was recorded. B. paid A. and others the reserved portion of the purchase-money. The clerk having died, his successor foreclosed the second mortgage, and, on a sale of the premises, there was a large deficiency, to supply which the clerk filed a bill to foreclose the first mortgage. Held, the clerk had no power to discharge the mortgage without an order of the Court; that, notice of the mortgage being given to B., and the mortgage being given to the clerk, the purchaser was thereby put upon inquiry, from what fund the investment was made, and whether the clerk had power to discharge the mortgage; and that the taking of the second mortgage was no payment of the first. As the premises were laid out in city lots, and worth much more than the mortgage debt and costs, the owners of the equity of redemption were permitted by the decree for foreclosure to direct in what order the lots should be sold. Walworth *v.* Farmers', &c., 4 Sandf. Ch. 51. The authority to discharge a mortgage must distinctly appear; otherwise the clerk will not be compelled to do it by mandamus. People *v.* Miner, 32 Barb. 612.

In Massachusetts, (St. 1847, ch. 195,) where the state treasurer is authorized to *discharge* a mortgage, he may *assign* it, with the same effect as in other cases of assignment; but the State shall thereby incur no liability, express or implied. In the same State, (St. 1848, ch. 151, § 2,) where an execution for possession has issued, and is afterwards satisfied by payment of debt and costs; the mortgagee, his executors, &c., shall, at the expense of the mortgagor, enter on the margin of the record of the execution an acknowledgment of satisfaction, or execute a deed of release, which shall be recorded, with proper notes of reference to the execution.

effected by compromise, if the consideration is avoided, the release will be avoided also.[1] So where a note and mortgage are given up to the mortgagor, without payment, and in exchange for others, which are worthless, but represented otherwise by the mortgagor, and in consequence of such representation; the mortgagee may still maintain a suit for foreclosure.[2]

59. And, in equity, the cancellation of a mortgage on the record is only *primâ facie* evidence of its discharge. It may be proved to have been made by accident, mistake, or fraud, and the mortgage will then be established, even against subsequent mortgagees without notice.[3] And the cancellation of a mortgage upon the record may be declared void, more especially, where it is made in violation of the rights of third persons. Thus a mortgagor, having conveyed a part of the premises, joined with the purchaser in procuring a loan to take up the mortgage, the purchaser agreeing to take an assignment of the mortgage for the lender's security, as against that part of the land which had not been conveyed. The purchaser ostensibly advanced half the money, and procured the assignment, but soon after, without the lender's knowledge or assent, cancelled it of record. Held, as against the lender the cancellation was void, and that he might still foreclose upon the portion not conveyed, and as against a second mortgagee, whose mortgage was made before such cancellation.[4] So a father directed his son to execute to his daughter, for the consideration, expressed in the deed, of love and affection, a note secured by mortgage of the father's land, which he promised to convey to the son. The father retained possession of the papers, but the mortgage was recorded. Afterwards, being dissatisfied with the marriage of the daughter, a minor, the father, without her consent, entered satisfaction of the mortgage on the record. Held, in a suit by the

[1] Heighway *v.* Pendleton, 15 Ohio, 735.

[2] Grimes *v.* Kimball, 3 Allen, 518.

[3] Robinson *v.* Sampson, 23 Maine, 388; Trenton, &c. *v.* Woodruff, 1 Green, Ch. 117; Vallé *v.* Iron, &c., 27 Mis. 455.

[4] King *v.* McVickar, 3 Sandf. Ch. 192; McLean *v.* Lafayette, &c., 3 McLean, 587.

daughter, still a minor, that such entry should be set aside, and judgment rendered for the amount of the note and interest, to be satisfied from the land.[1] And a discharge upon the record, to effect the purposes of justice, may sometimes be construed as an *assignment*. Thus A. made one mortgage to B. and another to C. The former was paid and discharged upon the record. Upon a conveyance of the land from A. to D., both A. and C. represented to D. that C.'s mortgage was paid, and C. discharged it upon the record. C.'s mortgage had been assigned to E., but the assignment was not on record. Held, as against E., B.'s discharge operated as an assignment of his mortgage to D.[2]

60. But, on the other hand, a trustee of the separate estate of a married woman, having become seised in his own right of the greater part of the premises, covered by a mortgage for $20,000, belonging to his *cestui que trust*, acknowledged satisfaction of such mortgage, and caused it to be cancelled of record; and soon afterward, conveyed to his brother one third of the premises, and took back from him his bond for $20,000, with a mortgage upon the part so conveyed to him, payable at the time of payment of the original bond and mortgage. This new mortgage the trustee substituted in lieu of the cancelled mortgage, and executed a declaration of trust, declaring that he held the same in trust for the separate use of his *cestui que trust;* but the property covered by the substituted mortgage turned out to be an inadequate security for the $20,000. On a bill filed by the *cestui que trust*, alleging that the original bond and mortgage had never been satisfied or paid, that the cancelment of that mortgage was without her knowledge or assent, and a breach of trust; held, the satisfaction of the first mortgage, which was produced in evidence, was *primâ facie* proof of its discharge; that the complainant had not shown that the second mortgage was not substituted with her assent, but that a sale should take place of so much of the premises as were included in the second mortgage.[3]

[1] Mallett *v.* Page, 8 Ind. 364.
[2] Wilson *v.* Kimball, 7 Fost. 300.
[3] Stuart *v.* Kissam, 11 Barb. 271.

61. Equity will also interfere in behalf of a creditor, where the debtor unfairly seeks to avail himself of the discharge of a mortgage, in avoiding payment of the debt secured. Thus a bill of discovery alleged that the plaintiff, holding a note, made by the defendant, secured by mortgage, in order to enable the defendant to procure a loan on a first mortgage of the land, at his request, and with the understanding and upon the promise that the plaintiff should be paid from the money thus obtained, executed a release of the mortgage; that the plaintiff afterwards brought a suit on the note, against which the defence of payment had been set up by way of specification; that the defendant had often stated his intention to prove such payment by the release of the mortgage; and that the plaintiff had no means of proving these facts, and was advised that he could not safely proceed to trial without a discovery. Held, the plaintiff was entitled to a discovery.[1] So in case of a note against two persons, secured by mortgage, if the payee acknowledges payment from the promisors upon the margin of the record, and discharges the mortgage; evidence is admissible to control such acknowledgment, of the acts and declarations of one of the promisors, in an action upon the note against the other.[2]

[1] Haskell *v.* Haskell, 3 Cush. 540. [2] Patch *v.* King, 29 Maine, 448.

CHAPTER XVIII.

ASSIGNMENT OF A MORTGAGE.

1. What constitutes an *assignment*, and what a *discharge*, of a mortgage.
2, 11, 20. Interest and intention of the parties.
3. Party having *a right* to an assignment. Intervening liens, &c.
6. Warranty, or quitclaim deed, whether an assignment.
12. Cases of *dower*.
13. Conveyance to a *trustee*.
14. Payment by mortgagor, after his equity is sold.
15. Cases of *suretyship*.
18. Conveyance of *part* of the land.
20. Joint mortgagors, — separation of joint interest.
21. In reference to parties who have *parted with nothing*.
22. Miscellaneous cases.
35. Mortgage of *indemnity;* when the law implies an assignment of such mortgage.
37. Conditional assignment of a mortgage, whether itself a mortgage.
42. Form of assignment.
46. What passes by an assignment; whether a mortgagee, after assignment, can release or bring an action.
55. Whether he shall be party to a suit for redemption or foreclosure.
57. Consideration paid by the assignee, whether material.
60. For what amount the mortgagor is liable to the assignee. Whether the latter is bound by previous payments, set-offs, &c.
73. Guaranty by the mortgagee, whether implied from assignment.
74. Effect of the mortgagor's joining in the assignment.
80. Recording of an assignment. How far an assignee's title may be affected by fraud or notice.

1. In speaking of the nature of a mortgagee's interest in the land, as connected with the personal obligation or liability which the mortgage is made to secure, it has been incidentally stated that mortgages are *assignable*. The question has been considered at length, (ch. 11,) how far a transfer of the debt has the effect of passing the mortgage. It now remains to speak more specifically of the express assignment of the mortgage itself, and of implied assignments, growing out of transfers and relations between the parties, which, in form or name, do not import to involve any direct substitution of one party for another, but are invested with this effect by *operation of law*. The latter branch of the subject, as being more immediately connected with that of *discharge* or *extinguishment*, which was treated in the last chapter, will be first considered.

2. Usually, where a claim secured by mortgage is transferred, the mortgage is *expressly* assigned, as part of the same transaction; and, under these circumstances, the rights of the parties are simple and well defined. It is held in general, that, when a mortgagee makes a deed of assignment upon the back of the mortgage deed, or by a separate instrument referring to it, the assignee is put in the place of the mortgagee, to all intents and purposes, unless a different intention is apparent from the contract.[1] And the assignee may himself assign, with the same effect.[2] Most of the questions upon the subject, as has been suggested, grow out of contracts or conveyances, which are claimed to operate as *implied* assignments, or assignments *by operation of law.* It will be seen, that the inquiry usually arising in this class of cases is, whether a certain transaction shall operate as an *assignment* or a *discharge* of the mortgage; and the general rule upon the subject is, that the intention or interest of the parties, so far as such intention was an innocent one, or more generally the interest and rights of third persons, connected in relation to the land with one or both of the parties, will control the literal import of the words used; more especially, where there is any fraud in the case.[3] In general, only actual payment or an express release extinguishes the mortgage, where equity requires its continuance.[4] The question turns upon the intention *at the time.*[5] It is said, "Equity (*a*) will sometimes keep alive a mortgage which has been substantially satisfied; but it is always for the advancement

[1] Hills *v.* Eliot, 16 Mass. 30, 31.

[2] Hoitt *v.* Webb, 36 N. H. 158.

[3] See Wells *v.* Morse, 11 Verm. 17; Robinson *v.* Leavitt, 7 N. H. 100; Campbell *v.* Knights, 11 Shepl. 332; Hatch *v.* Kimball, 2 Shepl. 9; 4, 146; Helmbold *v.* Man, 4 Whart. 410; Slocum *v.* Catlin, 22 Verm. 137; Eaton *v.* Simonds, 14 Pick. 104; Holden *v.* Pike, 24 Maine, 427; Duncan *v.* Drury, 9 Barr, 332; Van Wagenen *v.* Brown, 2 Dutch. 196; Mickles *v.* Townsend, 18 N. Y. 582; Champney *v.* Coope, 34 Barb. 339; Mallory *v.* Hitchcock, 29 Conn. 127; Post *v.* Tradesmen's, &c., 28 Ib. 420; New England, &c. *v.* Merriam, 2 Allen, 390; Heath *v.* West, 6 Post. 191; Hutchins *v.* Carleton, 19 N. H. 487; Wallace *v.* Blair, 1 Grant, (Penn.) 75; Wickersham *v.* Reeves, 1 Clarke, (Iowa,) 413; Howe *v.* Woodruff, 12 Ind. 214; Spencer *v.* Ayrault, 10 N. Y. (6 Seld.) 202; Robinson *v.* Urquhart, 1 Beasl. 515.

[4] Ladd *v.* Wiggin, 36 N. H. 421.

[5] Champney *v.* Coope, 34 Barb. 339.

(*a*) The same rule seems to be generally recognized *at law.*

of justice, and never to aid in the perpetration of a fraud, through the forms of law." [1] It is also said,[2] "Where there is no direct proof of the intention, it may be derived from various circumstances, and one of those is the interest of the party to merge his security, or to keep it alive. But that is only one circumstance, and it may be repelled by others. The party may intend to merge, upon a mistaken view of his interest. He may judge erroneously when he knows all the facts; and he may err exceedingly in regard to the law as applicable to what he is doing. But I am not aware of any principle upon which he can be saved from the consequences of a merger, where his intent is clear, although, by a mistake of the law, he supposes he will obtain advantages, which the law, correctly applied, entirely cuts off." (*b*)

[1] Per Gridley, J., McGiven *v.* Wheelock, 7 Barb. 29; Hinchman *v.* Emans, Saxton, 100.

[2] Loomer *v.* Wheelright, 3 Sandf. Ch. 157; acc. 34 Barb. 339.

(*b*) A daughter took by inheritance certain estates of her deceased father, and also became entitled, under his marriage settlement, to a sum which the trustees of the settlement had lent him on mortgage of the estates. The daughter by deed charged the estates, and the sum secured on them, with an annuity, and otherwise indicated that she intended the mortgage should be kept alive, at least for the purpose of securing the annuity. Soon afterwards she executed a will, devising the estates, after payment of her own debts, and *settlement of her father's affairs*, but not disposing of the residuary personal estate. Held, as against her next of kin, the incumbrance created by her father merged in the estates. Swabey *v.* Swabey, 15 Sim. 106.

On the 20th of August, 1800, a mortgage was made to secure the sum of $2,500, payable in one year. In 1801, a creditor of the mortgagor caused his equity of redemption to be sold on execution, and himself became the purchaser. In December, 1806, the creditor paid and took an assignment of the mortgagee's bond and mortgage, and, in January, 1811, conveyed the whole estate by warranty deed for $7,500. In March, 1810, the creditor assigned the bond and mortgage as security. The assignment was *acknowledged* after the deed of warranty, and the purchaser under that deed, in his answer, stated his belief that it was also *made* after that deed. Held, it was the intention of the creditor to extinguish the mortgage, as he could have no object in keeping it alive, and the bill against the purchaser was dismissed. Gardner *v.* Astor, 3 Johns. Ch. 53.

The purchaser of land mortgaged paid the mortgage, and no intention

3. The further general rule is laid down, that, where a discharge is given to a party who has *a right to an assignment*, the law will construe it to be an assignment, and enable him to maintain an action, and recover conditional judgment for the sum paid.[1] And, if one of the mortgagees purchases at a sale under a subsequent judgment, there is no merger.[2] So if the mortgagee purchases the equity of redemption, at a public sale by the mortgagor's administrator, there is no merger either at law or in equity.[3] (*c*) So in case of a creditor of the mortgagor, who levies upon the equity of redemption, and then pays the mortgage.[4] So if the holder of the equity of redemption takes an assignment of a forfeited mortgage, he may defend his possession, though obtained without suit or consent of the mortgagor.[5]

4. But, in general, to constitute an assignment, there must be a *record title*. Thus a tenant, holding under an execution sale of an equity, cannot be ousted by one having no record title to the equity, though he has paid off the mortgage.[6] So the title of the party making the payment must be one subsisting at the time. Thus, a decree of foreclosure having been rendered against a mortgagor, and being about to expire, the plaintiff agreed with the mortgagor to advance

[1] Drew *v.* Rust, 36 N. H. 335. See Weld *v.* Sabin, 20 N. H. 533.
[2] Wallace *v.* Blair, 1 Grant, 75.
[3] Walker *v.* Baxter, 26 Verm. 710.
[4] Warren *v.* Warren, 30 Verm. 530.
[5] Winslow *v.* M'Call, 32 Barb. 241.
[6] Wilson *v.* Soper, 44 Maine, 118.

---

was then disclosed to keep the mortgage alive, nor any contract made for an assignment of it. Eighteen years after such payment, the purchaser conveyed the land with warranty, and afterwards, without any new consideration, the second purchaser obtained an assignment of the mortgage from the mortgagee to the first purchaser. Held, the mortgage was discharged by the payment, and nothing passed by the assignment. Given *v.* Marr, 27 Maine, 212.

(*c*) A purchaser, at an execution sale, of a mortgaged estate, taking an assignment of the mortgage, cannot claim the amount paid for such assignment from the estate of the mortgagor assigned for the benefit of creditors. Cooley's, &c., 1 Grant, 401.

the amount of the decree, in consideration of which the mortgagor gave him a note for usurious interest upon the advance, secured by mortgage, and also collateral security for the sum to be advanced. The plaintiff paid the prior mortgage. Held, he did not thereby become subrogated to the mortgagee in reference to intervening incumbrancers. His payment was voluntary, not compulsory. "Instead of being compelled to pay the money to protect his interest under his mortgage, he obtained his mortgage merely in consequence of his agreement to pay the money and to protect him in so doing.[1]

5. And payment by the mortgagor, or other party for whose benefit the mortgage was given, will extinguish it, notwithstanding an agreement to keep it alive and assign it.[2]

6. In New York, it has been held that a *warranty deed* of the land does not pass the mortgagee's title, but that he may foreclose, though he have thus conveyed. So, if he have conveyed only a part of the premises, that he may foreclose for the whole under a power of sale, and may himself become the purchaser.[3] But it has since been held in the same State, that, although a sale made by a mortgagee is irregular, his deed operates as an assignment of the mortgage.[4] The Court say,[5] "The deed was sufficient, at least, to transfer to the defendant the money due upon the mortgage. The interest on the mortgage was in arrear, and the mortgagees were entitled to foreclose, or to sell under the statute. The defendant therefore occupies the position of a mortgagee in possession of the premises mortgaged; the money secured being due and unpaid. Although since the revised statutes a mortgagee cannot obtain possession at law, on default of payment, there is no doubt that he may retain the possession until redemption, if he succeed in procuring it by the mortgagor's consent, or in any lawful

[1] Downer *v.* Wilson, 33 Verm. 1, 5, 6.
[2] Champney *v.* Coope, 34 Barb. 539.
[3] Wilson *v.* Troup, 2 Cow. 195.
[4] Olmsted *v.* Elder, 2 Sandf. 325; acc. Hill *v.* More, 40 Maine, 515.
[5] Olmsted *v.* Elder, 2 Sandf. 327. See James *v.* Morey, 2 Cow. 246.

mode." And, in Massachusetts, a warranty deed of the mortgagee, after entering for foreclosure, passes the mortgage, although the notes are not assigned. (*d*) And if the assignee produces them at the trial, and offers to file them, he may have a conditional judgment.[1] So a conveyance by the mortgagee of part of the land does not discharge that part from the mortgage.[2]

7. A *quitclaim deed* from the mortgagee or his administrator to a third person, more especially where the mortgage is accompanied by no personal security, or if accompanied by a delivery of the mortgage notes, operates as an assignment of the mortgage. Or, it seems, if the deed includes but a part of the premises mortgaged, an assignment *pro tanto*. But the mortgagee, it is held, must be in possession.[3] Thus, where the mortgagor, remaining in possession, conveyed the land, and afterwards conveyed it a second time; and subsequently the mortgagee, who, before the second deed of the mortgagor, had recovered judgment and taken possession under his mortgage, in an action against the mortgagor, conveyed to the second purchaser by a quitclaim deed in the usual form, with a warranty against himself and all claiming under him; held, this conveyance did not operate as an extinguishment of the mortgage, thereby giving priority of title to the first purchaser from the mortgagor, but as an assignment of the mortgage. Shaw, C. J., remarked: "If this had been a deed in the usual form of words, 'give, grant, sell, and convey, release and quitclaim,' and if it is apparent that it was the intention of the releasor to transfer, and of the releasee to receive, the legal seisin, title, and in-

[1] Ruggles *v.* Barton, 13 Gray, 506.
[2] Wyman *v.* Hooper, 2 Gray, 141.
[3] Dorkrey *v.* Noble, 8 Greenl. 278; Dixfield *v.* Newton, 41 Maine, 221; Furbush *v.* Goodwin, 5 Fost. 425; Collamer *v.* Langdon, 3 Wms. 32; Grover *v.* Thatcher, 4 Gray, 526; Wyman *v.* Hooper, 2 Gray, 146. See New England, &c. *v.* Merriam, 2 Allen, 390.

(*d*) In New Hampshire, it is held that a conveyance of the land without a transfer of the mortgage note is effectual against all but the mortgagor; and he has merely a right to redeem. Hutchins *v.* Carleton, 19 N. H. 487.

terest in the estate, and not to cancel and extinguish the mortgage, the deed would so have operated, to pass the mortgagee's legal title. And we are are of opinion that such is the effect of the deed in the present case."[1] He further remarks,[2] upon the point of extinguishment: — "The mortgagee had a perfect right and legal power to assign his mortgage, if he thought fit, and to give to his assignee the same right which he held himself, that is, to receive the amount secured by the mortgage, from any person entitled by contract or by operation of law to redeem, and to hold the legal estate in security of the debt till it should be so paid. And we can see no reason why a purchaser of the equity of redemption, whether of a part or the whole of the mortgaged premises, is in any respect disabled from becoming such assignee. He may consider his equity of redemption of no value or of small value, or the title to it invalid or doubtful; and can there be any reason in law, why he who has the most urgent occasion for making such a purchase to protect his own interest, should be disabled from doing so, and be placed, in this respect, in a worse condition than a stranger? In order to effect a merger at law, the right previously existing in an individual, and the right subsequently acquired, in order to coalesce and merge, must be precisely coextensive, must be acquired and held in the same right, and there must be no right outstanding in a third person to intervene between the right held and the right acquired. The case we are considering supposes that a third person has by operation of law, by purchase or by attachment, acquired certain rights or claims to the equity of redemption, which do not extend to the mortgage. When, therefore, the equity of redemption by purchase, and the mortgage by assignment, vest in the same individual, they do not coalesce or merge, if there be in a third person a right of dower, a right acquired by purchase, or a real lien by attachment, intervening between the

[1] Hunt *v.* Hunt, 14 Pick. 374, 380; Crooker *v.* Jewell, 31 Maine, 306. See Macomber *v.* Mutual, &c., 8 Cush. 136, 137.

[2] 14 Pick. 383, 384, 385.

mortgage and the equity. (*e*) We think the present case is entirely within these principles. It is apparent from the form of the deed of quitclaim, from the qualified covenant against incumbrances, and from the manifest object of the parties, that it was the intent of the mortgagee not to discharge the mortgage, but to sell and transfer his legal title in the mortgaged premises, by the species of conveyance long known and used in this Commonwealth, when the intent is to pass an estate without warranty."

8. So if A. B., the purchaser of an estate subject to two mortgages, buys and takes an assignment of the prior one, and then gives a quitclaim deed of the land, delivering to the purchaser the note and mortgage; the estate passes, as against the second mortgagee, although upon the face of the note the words are written, "cancelled by A. B.," there being no other evidence of payment.[1]

9. So, after attachment of an equity of redemption, the mortgage debt was paid by a stranger, to whom the mortgagee, with the mortgagor's consent, gave a quitclaim deed

[1] Bell *v.* Woodward, 34 N. H. 90. See 5 Mich. 515; Evans *v.* Kimball, 1 Allen, 240.

(*e*) Of course there can be no merger for the benefit of a third party whose title is subsequent to both the estates which coalesce. Whitcomb *v.* Jacobs, 9 Gray, 255.

A quitclaim deed, without consideration, from mortgagor to mortgagee, cannot affect a previous attachment of the equity of redemption. And if the mortgagee afterwards purchase a claim against the mortgagor, and cause the equity to be sold on execution, he cannot set up his deed against the execution purchaser. Drew *v.* Rust, 36 N. H. 335. See Downer *v.* Wilson, 33 Verm. 1; New England, &c. *v.* Merriam, 2 Allen, 390; Bullard *v.* Leach, 1 Wms. 491.

Where a mortgagee assigns the mortgage, and afterwards takes a quitclaim deed from the mortgagor, the mortgage title does not merge in the fee; but the mortgagee becomes mortgagor, and the assignee mortgagee. Pratt *v.* Bank, &c., 10 Verm. 293. If, after such transfer, the mortgagee himself mortgage the land, the assignment not having been recorded, the title of the assignee will prevail over that of the mortgagee. Ibid.

of the land. The attaching creditor recovered judgment, and levied his execution upon the land, as upon unincumbered real estate. In a writ of entry by the heirs of the judgment creditor, against one claiming under the grantee of the mortgagee, it was held, that the deed operated not as an extinguishment, but a transfer of the legal title; that the judgment creditor by his levy did not acquire such title, but at most only an equity of redemption, which might be the foundation of a bill to redeem; but that this action could not be maintained.[1] So two of the plaintiffs, who were purchasers of an equity of redemption, contracted with one Richardson to sell him the land for $5,000, he providing for the redemption and for payment of the mortgage debt, which was about $3,000, and securing the surplus to the plaintiffs; the defendants, the mortgagees, having agreed to convey the land to Richardson, if not redeemed, and to pay him the amount due for redemption, if it should be seasonably demanded. The defendants gave a bond to Richardson, to secure their agreement, and he paid them the mortgage debt. The inducement to the foregoing transaction was, that the third plaintiff was absent at sea, and therefore no title could be made to Richardson except through the defendants; and also an apprehension by the defendants, that the mortgagors might have a right to redeem without the plaintiffs' consent. Hence it was agreed that Richardson should take his title from the defendants after a foreclosure of their mortgage. Held, the intention and effect of the transaction was, that the defendants assigned the mortgage to Richardson, subject to the remaining equity, the plaintiffs releasing their equity of redemption on being paid or secured their shares of the surplus over the mortgage debt; that the bargain between two of the plaintiffs and Richardson did not depend upon the consent of the other plaintiff, as the title was to come through the defendants; that Richardson's payment to the defendants must be considered as made for himself,

[1] Freeman *v.* McGaw, 15 Pick. 82.

upon a purchase of the land, not in discharge of the mortgage, which would defeat the object; that although the absent plaintiff had no opportunity to assent to the bargain or otherwise, yet, as the other plaintiffs were unable to redeem, the transaction was the best that could be done for him in preventing a foreclosure; and that the plaintiffs could not maintain a bill for redemption.[1]

10. Although, in general, the question of merger is one of *intent;* yet, where A. and B. held different portions of land subject to mortgage, and A. paid the debt and took a quitclaim deed from the administrator of the mortgagee, in an action by A. against B., it was held error to leave it to the jury whether a cancellation of the mortgage was intended. As matter of *law*, A. succeeded to the rights of the mortgagee.[2]

11. In addition to the direct transfers from the mortgagee, which, though not made in the form of assignments, have still been construed as such, there is a variety of cases, in which other transactions between the parties to the mortgage, or between one or both of them and third persons, have been brought in question, with reference to the point of assignment on the one hand or discharge on the other. Upon this subject it is said:[3] — " Whether a given transaction shall be held, in legal effect, to operate as a payment and discharge, which extinguishes the mortgage, or as an assignment, which preserves and keeps it on foot, does not so much depend upon the form of words used, as upon the relation subsisting between the parties advancing the money, and the party executing the transfer or release, and their relative duties. If the money is advanced by one whose duty it is, by contract or otherwise, to pay and cancel the mortgage, and relieve the mortgaged premises of the lien, a duty in the proper performance of which others have an interest, it shall be held to be a release, and not an assignment, although in form it pur-

[1] Howard *v.* Agry, 9 Mass. 179.

[2] Collamer *v.* Langdon, 3 Wms. 32.

[3] Per Shaw, C. J., Brown *v.* Lapham, 3 Cush. 554, 555; Tyler *v.* Lake, 4 Sim. 351; Aldridge *v.* Westbrook, 5 Beav. 188; Coote, 464; Vanderkemp *v.* Shelton, 11 Paige, 28; Knickerbacker *v.* Boutwell, 2 Sandf. Ch. 319; Cutler *v.* Lincoln, 3 Cush. 125; Kinley *v.* Hill, 4 Watts & S. 426.

ports to be an assignment. (*f*) When no such controlling obligation or duty exists, such an assignment shall be held to constitute an extinguishment or an assignment, according to the intent of the parties; and their respective interests in the subject will have a strong bearing upon the question of such intent." So, it is said, "the spirit of the cases seems to be this: that where the tenant in possession enters by virtue of a purchase from the mortgagor, then the subsequent purchase of the mortgage by him is an extinguishment."[1] So, when a mortgagor redeems, it should always be construed as a payment, he being personally liable for the debt. But when his vendee redeems, who is not personally liable, and there is an intervening mortgage between the one redeemed by him and his equity of redemption, the same rule should prevail as in the case of a redemption by a subsequent mortgagor.[2] So, where a mortgagor borrows money to pay off a mortgage, and gives a second mortgage therefor, and the first is cancelled; the second mortgagee has no equity to revive and be subrogated to the former mortgage, in order to overreach an intervening lien.[3]

12. The questions referred to have sometimes arisen in connection with a claim of *dower* in mortgaged estate. Thus, where dower was claimed in such a mortgaged estate, upon the ground that the mortgage had been assigned to the owner of the equity, and thereby extinguished, it was said by the Court, "When any right, estate, or interest intervenes between the particular and the general estate, which are thus united, no coalescence takes place, but each remains distinct. If the plaintiff had the right of dower claimed, it was a real interest in the estate intervening between the mortgage and the general right of redemption, which prevented a merger by the union of these titles."[4] And where the purchaser of

[1] Per Savage, C. J., Coates *v.* Cheever, 1 Cow. 460.
[2] Johnson *v.* Johnson, Walk. Ch. 331.
[3] Banta *v.* Garmo, 1 Sandf. Ch. 383.
[4] Brown *v.* Lapham, 3 Cush. 557.

(*f*) See Garwood *v.* Eldridge, 1 Green, Ch. 145.

an equity of redemption, after taking possession, took an assignment of the mortgage, and entered to foreclose; held, the widow of the mortgagor might elect to consider him in possession under the mortgage, though the entry was ineffectual for foreclosure; and that upon a bill in equity to redeem, brought by her, he was bound to account for the rents and profits from the time of assignment, but not for those received prior to the assignment.[1] (*g*)

13. A mortgagee may preserve the mortgage, by taking a conveyance of the equity of redemption to a *trustee*, declaring such to be his purpose.[2] (*h*)

14. A mortgagor, who is compelled to pay the mortgage debt, after selling the estate subject to the mortgage, becomes an equitable assignee of the mortgage.[3] On the other hand, if a purchaser of the equity buys and takes an assignment of a prior mortgage, it still subsists in his favor against a subsequent one, and may be validly transferred.[4] So where, after an execution sale of an equity of redemption, the mortgagee entered under a judgment and writ of possession for condition broken, and before foreclosure conveyed all his interest in the land to the mortgagor; in an action by the heirs of the mortgagor against parties claiming under the execution purchaser, held, the transfer by the mortgagee

[1] Gibson *v.* Crehore, 5 Pick. 146.
[2] Bailey *v.* Richardson, 15 Eng. L. & Eq. 218.
[3] Kinnear *v.* Lowell, 34 Maine, 299.
[4] Bell *v.* Woodward, 34 N. H. 90; Dutton *v.* Ives, 5 Mich. 515.

(*g*) A. mortgaged, then married, then made new mortgages, for the same amount, in which his wife did not join, the mortgagees paying off the old mortgages, and taking the new as security for that advance. Held, in equity, that the first mortgage was not discharged, but should be considered as assigned to the second mortgagees, who therefore held superior to the *homestead* right, and, also, the mortgages being recorded, to a subsequent purchaser from A. and his wife. Swift *v.* Kroemer, 13 Cal. 526.

(*h*) In Iowa, the acceptance of the legal title (apparently in trust) by a mortgagee (by the Code, the legal title remaining in the mortgagor) does not work a merger, where none is intended, and it is against the interest of the purchaser. Wickersham *v.* Reeves, 1 Clarke, (Iowa,) 413.

was an assignment, not an extinguishment, of the mortgage, the sale of the equity being equivalent, with reference to the rights of the parties to this suit, to an absolute sale by the mortgagor himself.[1] So A. levied an execution on mortgaged land, after a decree for foreclosure, but before the time limited by the decree for redemption, and caused so much thereof to be set out as would, in the opinion of the appraisers, amount to the sum levied for and the mortgage money. He then procured from the mortgagee an assignment of his interest, which he caused to be recorded after the equity of redemption had expired. Held, that he was not under such obligation to redeem, that the assignment must operate as an extinguishment of the mortgage, and that he might hold the whole of the land against the mortgagor.[2]

15. The same point arises in reference to the rights of a *surety* for the mortgage debt. Thus, where the wife of A. joined with him in several mortgages of her own land to secure his bonds; and, before the death of A., his attorney, with funds furnished by him, paid the mortgages, and took an assignment of them to B., who gave a certificate to A., that he held them in trust for him, and subject to his control; held, A. was the principal debtor, and his wife's land stood in the relation of surety for his debt; that the securities belonged to him in equity, and the lands were discharged from the mortgages.[3]

16. On the other hand, A. and B., tenants in common, mortgaged to the defendant for half the purchase-money, the other half being paid by B. B. afterwards quitclaimed his interest to the defendant, and A. conveyed, with notice, to the plaintiff. In a bill for redemption, held, the whole amount of the mortgage must be paid in order to redeem; that, under the circumstances, B. was merely a surety for A., and the mortgage was not merged.[4] So a mortgagee, for indemnity, purchased the equity of redemption at a sheriff's sale, and paid the debt for which he was surety. Having refused, on

[1] Parker *v.* Parker, 4 Pick. 505.
[2] Tichout *v.* Harmon, 2 Aik. 37.
[3] Fitch *v.* Cotheal, 2 Sandf. Ch. 29.
[4] Crafts *v.* Crafts, 13 Gray, 360.

request, to acknowledge satisfaction, the mortgagor instituted a suit for the penalty provided by statute, if a mortgagee, having received satisfaction of the mortgage, refuses, on request of the mortgagor, to acknowledge satisfaction thereof on the record. Held, he was not entitled to recover.[1] So A. gave to B. a bond and mortgage, and afterwards a mortgage of the same land to C.; and D., a relative of A., paid or handed to B. two several sums, at different times, taking loose receipts therefor, on account of the bond, and afterwards a further sum for the balance due, whereupon the three sums were credited on the bond. Held, the bond and mortgage in the hands of D. should have priority over the mortgage to C.[2]

17. And the same point, of the rights of a *surety* in case of mortgage, is illustrated by the following case. Land mortgaged to secure a bond was conveyed by the mortgagor, the purchaser agreeing to pay the debt and interest. Upon his failure to pay the interest, the mortgagor paid it, and it was indorsed upon the bond. The mortgagor then purchased the securities, and took an assignment of them in the name of a trustee. Held, upon a sale of the land by a sheriff, he was entitled, as against a subsequent judgment creditor of the purchaser, to receive from the proceeds the principal as well as interest of the mortgage debt.[3] The Court say:[4] — "Contrary to what would seem to be the English doctrine on the subject, it is now definitely settled in Pennsylvania, that, though actual payment discharges a judgment or other incumbrance at law, it does not in equity, where justice requires it should be kept afoot for the safety of the paying surety. And this is always the case where the amount of the debt is advanced to procure the control of the security, and not with the intent to extinguish it." In regard to a supposed distinction in this respect between *the principal and interest* of the debt, the Court further remark: — "It is ordinarily diffi-

[1] Phelps *v.* Relfe, 20 Mis. 479.
[2] Lambert *v.* Hall, 3 Halst. Ch. 410, 651.
[3] Morris *v.* Oakford, 9 Barr, 498.
[4] Ibid. 500, 501.

cult to conceive a mere surety's intention to be extinguishment and not advancement. *Primâ facie*, the latter is to be taken as the object. Here, everything negatives the idea (that) the mortgagors intended to discharge the yearly interest in case of Barrington, who had expressly agreed to pay it. Nor does this conclusion work injustice to Morris, the subsequent judgment creditor. He took his judgment, of course, subject to the prior mortgage, as it was exhibited by the record, and the interest growing due under it. He must be taken to have had notice of the debtor's express undertaking to discharge the mortgage debt and its interest. He was bound to know that payment of the latter by the mortgagors did not discharge the land of its lien. His delay to enforce his judgment was consequently at his own risk, in the absence of imputed fraud or deceit practised by the mortgagors, to whom, at all times, he might have had recourse for information."

18. Where *a part* of land mortgaged is conveyed, the purchaser agreeing in the deed to pay the mortgage, and he resells, and the second purchaser buys the mortgage; this is a discharge of the mortgage.[1]

19. But, on the other hand, a mortgagor conveyed one half the land, by metes and bounds, to A., the other to B., paid the mortgage in part, and died. A. pays the balance, taking an assignment of the mortgage. The heir of B. brings ejectment against A. for the B. half. Held, there was no merger as to this half, but the defendant had the rights of an assignee.[2] So where a mortgagor transfers a part of the land, and the mortgage is assigned to the purchaser, the mortgage is not thereby merged as to the remaining part.[3] So where a mortgagor conveyed part of the land, and the grantee afterwards purchased the mortgage, and the residue of the land was then sold on execution against the mortgagor, with notice to the purchaser of the mortgage and

[1] Russell *v.* Piston, 3 Seld. 171. See Wyman *v.* Hooper, 2 Gray, 141.
[2] Casey *v.* Buttolph, 12 Barb. 637.
[3] King *v.* M'Vickar, 3 Sandf. Ch. 192.

the amount due upon it; held, the former purchaser could maintain ejectment against the latter, and hold until the mortgage debt was paid.[1]

20. Similar questions may arise from the conflicting rights of persons, who joined in purchasing and mortgaging the land, but whose interests have become diverse in consequence of subsequent dealings relating to the mortgage, to which all of them were not parties. In such case, the general rule of *intention* is held to determine the legal effect of an otherwise doubtful transaction. Thus, where two purchasers of land jointly mortgage it for the price, and one of them pays the mortgage by instalments, and upon the last payment takes an assignment of it; this does not operate as a merger or extinguishment, so as to give priority to a subsequent judgment creditor of the other purchaser.[2] Coulter, J., says:[3] — "Here the intent of the mortgagor and mortgagee was quite apparent, that the security or incumbrance should be kept on foot, because the mortgagee assigned it to the recovering mortgagor. It is also clearly the interest of the mortgagor, that it should not sink in the inheritance. If it should be so held, an incumbrancer would get part of the proceeds of the sale in this case against equity, because, at the time he procured his incumbrance, the mortgage was indisputably the oldest lien, and it continued so up till the payment of the money by Hart. Why, then, should the judgment against Duncan, the other mortgagor, who had really no equity in the land, all the money having been paid by Hart, be held extinguished by Hart's payment of the money contrary to the expressed intent of the parties, merely to take that much out of his pocket in favor of one whose whole lien was subject to the lien of the mortgage? If he or anybody else had bid off the land, to an amount exceeding the mortgage, then he would have got his money."

21. Another turning point in cases of this nature is expressed as follows: — "It may be, that a person who has

[1] Fluck *v.* Replogle, 13 Penn. 405.
[2] Duncan *v.* Drury, 9 Barr, 332.
[3] Ibid. 333.

become a creditor or has parted with his rights upon the faith of a legal presumption of the merger of a mortgage, fairly raised by the acts of the party in whom the right to the mortgage and the estate in fee had become united, all of which is placed upon record, shall be entitled to have the mortgage considered merged as respects him; yet here the persons claiming to have the benefit of a merger parted with nothing upon the faith of any such presumption. They had been creditors, and obtained their liens before; their condition was not made worse by keeping the mortgage alive."[1]

22. The following miscellaneous cases, with great variety in their particular facts, illustrate the general rules above laid down.

22 *a*. Writ of entry. The demandant claimed under a mortgage from Blanchard to the Hingham Institution for Savings, dated September 23, 1837, to secure a note for $2,000, and assigned by the mortgagee to the plaintiff, August 27, 1841. Blanchard, on the 6th of May, 1839, leased a part of the premises to the defendants for five years, they agreeing to pay him so much per annum as rent, to lend him $500 on his note, and to take payment of the note by annually indorsing the rent thereon. June 12, 1839, Blanchard, for the consideration of $2,000, conveyed the premises to the demandant "subject to a mortgage of $2,000 to the Hingham, &c., and the store occupied by (the defendants) being under lease to them of five years, and $500 having been already paid to said Blanchard on the lease;" the demandants giving back a bond to reconvey upon payment of $2,000 in three years, with interest annually. Neither party understood this transaction as a mortgage, but as a sale for the full value of the premises. Previously to the assignment of the mortgage to the demandant, one of the defendants offered the mortgagees to pay and take an assignment of the mortgage, but the latter refused the offer. Held, the action was maintainable. The Court remark:— "The question is, whether, upon the facts reported, the mort-

[1] Moore *v.* The Harrisburg Bank, 8 Watts, 150.

gage was extinguished by the said assignment. And we are all of opinion that it was not. When the demandant took the assignment, he held the same premises by virtue of a subsequent mortgage to him from the said Blanchard; and he had the right to pay off the previous mortgage and to extinguish the same, or to take an assignment of it, and to keep up the incumbrance for his own benefit, and to protect himself against intervening incumbrances. The general rule is, that where the legal title by the mortgage becomes united with the equitable title, — the mortgage is merged and extinguished. But if the owner of the legal and equitable titles has an interest in keeping those titles distinct, he has a right so to keep them, and the mortgage will not be extinguished. This action may be well maintained, the demandant having the legal title. But the tenants have a right by virtue of their lease to redeem the prior mortgage, and they will be entitled to have a conditional judgment entered." [1]

23. An execution being extended upon land of the debtor, subject to two mortgages, the mortgagees made an agreement with the mortgagor, to which the creditor was privy, that the land should be sold, and the proceeds applied first to their mortgages, then to the execution. The land was accordingly sold, and the purchaser paid the mortgages, and the balance of the proceeds to the execution creditor. The first mortgagee acknowledged satisfaction upon the record, and the second released all his right to the mortgagor. On the same day, the mortgagor conveyed with warranty to the purchaser. Held, without regard to the execution creditor's knowledge of the transaction, the effect of it was, to make the purchaser substantially an assignee of the mortgages, the mortgagor being a mere instrument for effecting the assignment; and that the execution creditor could not hold the land without paying the mortgages to the purchaser.[2]

24. In Tuttle *v.* Brown,[3] it was held, that the purchaser of

[1] Loud *v.* Lane, 8 Met. 517.
[2] Marsh *v.* Rice, 1 N. H. 167.
[3] 14 Pick. 514.

an equity of redemption sold on execution, who afterwards takes an assignment of the mortgage, may recover possession of the land, by a suit commenced before the expiration of the mortgagor's right to redeem the equity, without an entry by himself or the mortgagee. There is no merger of the mortgage.

25. If the assignee of a mortgage prosecutes the foreclosure suit to judgment and execution, and sells thereupon a part of the land of which he holds the equity; there is no merger.[1]

26. A mortgagee, before foreclosure, agreed to receive the sum due at a certain day, after foreclosure, which he received accordingly, and by the mortgagor's direction transferred his title to a third person, who had advanced most of the money. Held, this was not a payment and discharge of the mortgage, but a conveyance of the land, and that although the assignee gave to the mortgagor, soon after the transfer, a written promise to convey to him on payment of his advance with interest, he did not thereby become a mortgagee, whose title would not be liable to an execution. It seems, as against him, the mortgagor might specifically enforce the contract, if no rights of third persons had intervened, and that such contract might in equity constitute a mortgage or trust.[2] Woodbury, J., remarks as follows:[3] — "It would be unjust to treat the transaction as a payment and a mere discharge of the mortgage. Because that would strip Webster, who advanced most of the money, of all security for it; and it would do this also against the clear intent of Spring, the mortgagor, who not only procured a conveyance of the premises to be made to Webster by the bank, which is inconsistent with an intent merely to discharge the mortgage, but took back a writing from Webster, stipulating to permit Spring to pay him the sum advanced at any time within three years; and then to receive back a conveyance of the premises. All this shows explicitly Spring's intention not to have the money paid to the bank applied simply to discharge the mortgage,

[1] Knowles *v.* Lawton, 18 Geo. 476.
[2] Shapley *v.* Rangeley, 1 W. & M. 213.
[3] Ibid. 218, 219.

but rather to have the bank's title under it conveyed to some third person. The parties must in equity be regarded as intending to have an absolute estate exist in the bank, but under a stipulation that it should be conveyed to Spring or his appointee, at the time the check became payable, if the money was then paid; that such an estate was conveyed to Webster by the bank, he being properly selected by Spring to receive the conveyance on account of his having advanced most of the money, and that Webster thenceforward held an absolute estate, and not an assignment merely of a mortgage. It was not an assignment of the mortgage merely, for other reasons, because it had become foreclosed, and must be so considered in order to enforce the views of the parties and the equities of the case. Nor does it purport to be a mere assignment, as the note and mortgage deed were given up to Spring rather than transferred to Webster, he getting a conveyance of the premises only. Webster's writing to Spring was not sealed, nor given the same day with the deed; nor was it an agreement between the parties to the deed. And this would prevent it from being what it otherwise might be, a defeasance, and the deed coupled with it a mortgage on its face. But for the circumstance of the writing not being between the grantor and grantee in the deed, it might be held in chancery, if Webster could sue Spring for the money, that such writing converted the deed into a mortgage. Possibly Spring, if he chose, might in chancery have the land charged with a trust or mortgage, before any third person had bought or levied on the premises without notice of Spring's claims. But as to such third persons, the title of Webster must be deemed an absolute one."

27. After the bringing of a writ of entry by a mortgagor, the assignment by a mortgagee, to the tenant in such action, of a mortgage on the land, the condition of which has been performed, will not defeat the action.[1]

[1] Chadbourne *v.* Rackliff, 30 Maine, 354.

28. In the case of Peltz *v.* Clarke,[1] certain land which had been mortgaged was sold, after the mortgagor's death, by trustees, to pay his debts. No deed was given to the purchaser, but he had paid most of the purchase-money. The mortgagee brought ejectment upon the mortgage against the trustees and the heirs of the mortgagor, and obtained a decree for foreclosure and sale. The purchaser, with the consent and in presence of one of the trustees, paid the whole amount due upon the mortgage, it being considered a part of the purchase-money due under the trustees' sale. The mortgagee gave the purchaser a receipt, and an order to enter the suit "settled," which was done. The heirs of the mortgagor then bring an action of ejectment against the purchaser. Held, although a stranger could not set up a mortgage, satisfied by the mortgagor, to defeat his title, he might thus use a mortgage bought in by himself; that, as the purchaser owned the equitable estate, and had paid off the mortgage on his own account, the incumbrance belonged to him, and the mortgagor could not have demanded a reconveyance from the mortgagee; and that this action could not be maintained.

29. Mortgage, to secure certain sums of money, and also the payment by the mortgagor to a bank of a certain sum due from the mortgagee, and for which the mortgagee had mortgaged the same land to the bank, with a power of sale. Afterwards the mortgagor became a bankrupt; the premises were sold under the power, and the mortgagor became the purchaser. He subsequently received a discharge in bankruptcy. Held, the mortgagor did not acquire an absolute title, but took, subject to his own mortgage, so far as the debts thereby secured remained unpaid, although that mortgage contained no warranty of title.[2]

30. Writ of entry, founded upon a mortgage from Fry to Gould, an assignment thereof to Willard, and a supposed assignment to the father of the demandant, since deceased, in whom, it was contended, an absolute title vested by foreclosure. The action was brought against a second mortgagee.

[1] 5 Pet. 481.

[2] Stewart *v.* Anderson, 10 Alab. 504.

It appeared that the demandant, after purchasing the right of redeeming both the mortgages, which purchase proved to be void in law, paid to Willard the amount of his mortgage, taking from him a deed, in which he "remises, releases, grants, bargains, and sells," his interest in the land, referring to the mortgage, "meaning hereby to release all the right I have in the premises by virtue of said mortgage, the aforesaid sum having been this day paid me in discharge of said mortgage." Held, the action could not be maintained, the deed in question having operated, not as an assignment of Willard's claim, with the land as security, which claim was paid by the demandant, but as a grant of the legal estate, or a satisfied mortgage.[1]

31. Where a second mortgagee, holding also a mortgage from a surety for the same debt, purchases the premises of the mortgagor, subject to the first mortgage, for a price exceeding both mortgage debts; his own debt is merged and extinguished, and the surety no longer liable.[2]

32. Where an assignment would be more beneficial to a junior mortgagee than a satisfaction of the prior mortgage, he may, by a bill in equity, have a decree for redemption and to compel such assignment, after tendering the debt and demanding an assignment.[3]

33. A mortgage may, under some circumstances, be discharged in reference to the mortgagee, but revived in the hands of an assignee. Thus, there being several mortgages upon land, and the owner of a former mortgage becoming indebted to the owner of the equity of redemption, the mortgage debt was allowed in part satisfaction of such debt. The mortgage was not cancelled, but was assigned to A., for the benefit of the owner of the equity, who afterwards borrowed money of B., and caused the bond and mortgage to be assigned by A. to B., as security. Held, the mortgage was discharged in the hands of A., who took no better right than

[1] Wade *v.* Howard, 11 Pick. 289.
[2] Loomer *v.* Wheelwright, 3 Sandf. Ch. 135.
[3] Pardee *v.* Van Anken, 3 Barb. 534.

his assignor; but that the assignment revived it, subject, however, to subsequent incumbrances.[1]

34. Parol evidence, that an assignment of a mortgage was intended to be a discharge, is inadmissible, even on the part of a third person, except for the purpose of proving fraud; such as a fraudulent variance from the agreement of the parties, in order to accomplish some covert purpose.[2]

35. The question has sometimes arisen, whether a *mortgage of indemnity*, that is, a mortgage made to secure the mortgagee on account of his liabilities as surety for the mortgagor, is extinguished by subsequent transactions, which relieve the mortgagee from any direct indebtedness, without subjecting him to any loss, while at the same time they substitute some third party in his place under the mortgage. One Buck, in 1839, made a mortgage to Shaw, conditioned as follows: — "Whereas said Shaw, on the 13th of September last, signed a note, with said Buck as surety, for $4,000, payable to Daniel Smith or order in four years from date, with annual interest; now, if said Buck shall save said Shaw from any trouble, cost, or expense, by reason of signing said note, this deed is to be void." In 1841, the equity of redemption was attached, and in April, 1843, sold on execution, and conveyed to Hale and Eames. In September, 1843, the mortgagee assigned the mortgage to the defendant, as follows: — "In consideration of (the defendant) agreeing to release me from all liability, other than the use of my name, in the collection of the same, of a joint and several note, signed by Bushrod Buck and myself for $4,000, dated October 7, 1839, I hereby assign, transfer, and set over to (the defendant) all my right, interest, and claim to the within mortgaged premises." The defendant thereupon took peaceable possession, and held it for the purpose of foreclosure. The plaintiff brings a bill in equity to redeem against the defendant, claiming that nothing was due on the mortgage, because, by the assignment, Shaw was released from his

[1] Bolles *v.* Wade, 3 Green, Ch. 458. [2] Howard *v.* Howard, 3 Met. 548; Tyler *v.* Taylor, 8 Barb. 585.

liability as surety for the mortgagor, and the mortgage discharged. Held, this was not the effect of such assignment, and that the defendant should hold the land as against the plaintiff, until the latter should pay the mortgagor's note to the defendant.[1] The Court (substantially) remark :[2] — "The real purpose of the assignment is quite obvious; and the instrument ought to be so construed as to secure that object, if it may be consistently with the rules of law. The equity of the case is obviously with the defendant, upon the question whether his note shall constitute a lien upon the premises, before the defendant can be required to release the mortgage. The object seems to have been, that the defendant should receive from Shaw a transfer of the mortgage, and thereafter rely solely upon that, and make no claim on Shaw personally. The defendant at once entered into peaceable possession for foreclosure. It is contended that the mortgage is discharged, because (according to the terms of the condition) Shaw has been saved from all trouble, &c., and that by force and effect of the arrangement made by the defendant with Shaw, he could be no further damnified. In the assignment it is recited, that in consideration of the defendant's agreeing to release him from all liability, other than the use of his name in the collection of the note, he assigns to the defendant all his right, &c., to the mortgaged premises. This instrument is not signed by the defendant, though accepted by him, and to some purposes assented to by him. But we do not think it necessarily is to have the same effect as a release, under his hand and seal, to Shaw, might have had. There might have been a technical release to Shaw, the effect of which perhaps could not be avoided. But we may take into consideration the entire language and purpose of the instrument. It was only a substitution of the mortgage, for the personal liability of Shaw, and intended to be effected through the name of Shaw. The use of his name in the collection of the note was distinctly stipulated for in the assignment. It contem-

[1] Hayden *v.* Smith, 12 Met. 511.

[2] Ibid. 513.

plated the use of it, so far as was necessary to perfect the lien. The note has not been paid. It may be enforced against Shaw, unless discharged by the recital in the assignment. The recital was only a qualified discharge, to the extent compatible with the continuance of the security by mortgage. All parties understood the mortgage was a lien upon the property, to secure the note to the defendant."

35 *a*. So, pending a bill to foreclose, the solicitor of the complainants, with their consent, received from A., a friend of the mortgagor, part of the debt, agreeing that A. should have the benefit of the mortgage to that amount. Held, an assignment in equity *pro tanto*, as against a subsequent mortgagee, who could not treat it as a payment.[1]

36. But, on the other hand, after assignment of a mortgage, the mortgagor conveyed the estate, and the purchaser subjected it to lien by way of mortgage, and then gave notes with an indorser to the assignee for the interest due on the original mortgage, which were paid by the indorser. The land having been sold, held, the indorser could not claim title as an assignee of the first mortgage, by subrogation.[2] So A. appointed an agent to obtain a loan, authorizing him to execute a mortgage. B. indorsed a note for the agent, which C., by a subsequent arrangement with A., undertook to pay. B., afterwards learning that C. would not pay, took the mortgage, but, before its execution, C. had paid the note, and B. assigned the mortgage to C. Held, C. could not enforce it.[3] (*i*)

[1] McMillan *v.* Gordon, 4 Ala. 716.
[2] Neptune, &c., *v.* Dorsey, 3 Md. Ch. 281.
[3] Ravenel *v.* Lyles, Speers, Ch. 334.

(*i*) In Viles *v.* Morlton, 11 Verm. 470, the defendant was co-surety with Edson and Story to the plaintiffs for William Ford, who gave Edson and Story a sufficient mortgage of indemnity. Ford subsequently mortgaged the same property to Blake, and also gave a mortgage of other property, to be discharged on Ford's paying the plaintiffs' debt. Blake purchased the equity of redemption of the mortgaged premises, and then paid the plaintiffs'

37. The assignment of a mortgage may itself be construed as a mortgage, subject to all the rights and privileges incident to the original, conditional conveyance. (*j*) Thus the plaintiff, being indebted to the defendants upon a note to the amount of $2,000, and in embarrassed circumstances, upon their application assigned to them as security a bond and mortgage for $4,000; it being expressly agreed, that the surplus, after paying the note, should belong to him. The terms of the assignment were, that he, for the sum of $2,000, assigned the securities to the defendants, with power to collect $2,000 for their own use; adding a covenant that this sum was due on the mortgage, and that the premises should sell for so much, with the interest and costs. In 1817, the defendants foreclosed, and caused the premises to be bid in for $700. Before the sale, the plaintiff was told by the agent of the defendants, that, if they purchased, the property should remain as it was to him, and the mortgagors only be foreclosed. The plaintiff always insisted upon his right to redeem, and in 1825 directly applied to do so, and offered to pay all that was due; but the defendants would not allow him to redeem. Held, the assignment was a mortgage, and would have been such, even though in terms absolute; that the defendants might foreclose under the statute so as to bar the mortgagors; that the assignment was a mortgage of the power of sale as well as of the debt; that, if the purchase had been made by a third person, the plaintiff would have lost his right to redeem the land, but might still redeem in reference to the surplus of the purchase-money, and, the defendants being themselves the purchasers, and still retaining the legal

---

notes. Held, no action could be maintained upon the notes by or in the name of the plaintiffs, they being paid by the owner of the equity of redemption and second mortgagee. See Converse *v.* Cook, 8 Verm. 166.

(*j*) In Maine, it seems a conditional assignment of a mortgage may be treated as a mortgage of real estate, subject to redemption for three years. If otherwise, then subject to redemption in reasonable time. Cutts *v.* York, &c., 6 Shepl. 191. So in Michigan; Graydon *v.* Church, 7 Mich. 36.

title, he had not lost his right to redeem the land itself; and, the assignment being itself a mortgage, and the plaintiff's right of redemption not divested by the statute of foreclosure, that the question of waiver by lapse of time did not arise.[1]

38. Where a bond and mortgage are assigned as security for a debt, a subsequent assignee takes them, subject to the right of the first assignor to redeem, by paying such debt, with interest.[2]

39. Where a second assignee of a mortgage paid the first assignee the debt, to secure which the first assignment was made, and the balance of the mortgage debt to the mortgagee, by agreement of parties; and the mortgagee and second assignee had notice of an unregistered deed of the land, prior to the mortgage: held, the first grantee was entitled to redeem, on payment of what the second assignee paid to the first, with interest.[3]

40. It is generally considered, that the introduction of a new proviso of redemption in the assignment of a mortgage does not constitute a new mortgage. But where the mortgagee assigned a part of the mortgage debt, and joined with the heir of the mortgagor in mortgaging a part of the lands anew, with a new proviso and rate of interest, and a bond and covenant; held, in a late case, this constituted a new mortgage.[4]

41. A mortgagee, who has pledged the mortgage for a sum less than the mortgage debt, may file a bill for foreclosure in his own name; especially if the pledgee refuses to do it. The latter may lawfully file such bill, and in such case would be trustee for the surplus over the amount of his own claim.[5] (*k*)

[1] Slee *v.* Manhattan, &c., 1 Paige, 48.
[2] Sweet *v.* Van Wyck, 3 Barb. Ch. 647.
[3] Glidden *v.* Hunt, 24 Pick. 221.
[4] Coote, 357; Barham *v.* Earl, &c., 3 M. & K. 106.
[5] Norton *v.* Warren, 3 Edw. 106.

(*k*) The mortgagor, by assenting to a subsequent assignment of the mortgage, by his assignee, to secure a debt of the latter less in amount than the

42. With regard to *the form* of an assignment, the assignment of a bond and mortgage may be valid, especially in equity, though the assignee be not called by name; it is sufficient to describe him in a particular character sustained by him, if this description identifies him as well as a name.[1] (*l*)

[1] Lady Superior *v.* McNamara, 3 Barb. Ch. 375.

---

mortgage was first assigned to secure, is not estopped from asserting his right to redeem.

And this, notwithstanding at the time of such assignment he said, that, if the debt he was owing was paid from the mortgage, he would be satisfied.

And where a receiver in chancery, to whom such mortgagor of a mortgage had assigned, was called upon by a subsequent assignee and requested to redeem his interest in the mortgage, and was told that unless such redemption was made, the assignee was about to transfer the mortgage to another, and the receiver declined to redeem, and told the assignee he might sell to whom he pleased, whereupon the assignee did sell, but to one who was aware of the conditional nature of the assignment; held, the receiver did not thereby forfeit his right to redeem, or estop himself from asserting such right.

Where a mortgage was assigned by the mortgagee to his creditor as security, and again to the receiver of such creditor, and a subsequent assignee of the mortgage, the last of several sub-assignees claiming under an assignment made prior to the receiver's appointment, to secure a sum less than that for which the first assignee held his assignment as security, took a deed of the mortgaged premises, from the original mortgagor to himself; held, this deed had the effect to foreclose the mortgage as to the mortgagor so conveying; that the land now represented the mortgage, and the mortgagor of the mortgage, or the receiver claiming under him, might file his bill in chancery, and have a decree that the amount of the mortgage, less the sum it was assigned to secure, be paid to him, and, in default thereof, the premises be sold, to satisfy first the sum the mortgage was assigned to secure, and next to pay him the amount of the mortgage less such sum.

Where such bill was filed, and it appeared that possession had been taken under such deed, and the complainant had been remiss in asserting his rights, and might thereby have induced the defendants to treat the property as their own, discharged of the lien of the mortgage; it was held, that the complainant was not entitled to an account of the rents and profits of premises as against the defendants. Graydon *v.* Church, 7 Mich. 36.

(*l*) In Shaw *v.* Loud, 12 Mass. 449, a bond and mortgage were given to the plaintiffs by the description of *the heirs at law of John Tyrrel*, without

43. The assignment of a mortgage, like the mortgage itself, may be made to several persons, jointly. And where, in such case, each assignee pays a certain part of the consideration, and the assignment specifies the share of each; a payment of such share to one is held to extinguish his interest, so that he has no longer any power to re-assign.[1]

43 *a*. Actual delivery is held not indispensable to a valid assignment.[2] (*m*) It may be made by a mere indorsement.[3] So it has been held, that, where one person takes a bond and mortgage for the benefit of another, payable to the former, under a previous agreement to assign them to the latter, no particular formality of delivery and acceptance is necessary, but placing them before him for his signature to the assignment is a good delivery, and the execution of such assignment a good acceptance.[4] On the other hand, an assignment of a mortgage is valid, although the mortgage notes be not indorsed or specified in the assignment, if the notes are delivered to the assignee.[5] But mere delivery will not impair the effect of a written assignment. Thus the U. S. Co. mortgaged their mining claim to R., in order that he might hold it in trust for F., who was surety on R.'s note to D., the money raised on which was used by the U. S. Co. R. assigned to F., who took the mortgage, but immediately returned it to R. to collect the interest as his agent. Held, R.

[1] Furbush *v.* Goodwin, Law Rep., March, 1855, p. 650.
[2] Aldridge *v.* Weems, 2 Gill & J. 36.
[3] Barnes *v.* Lee, 1 Bibb, 526.
[4] Lady Superior *v.* McNamara, 3 Barb. Ch. 375.
[5] Pratt *v.* Skolfield, 45 Maine, 386.

---

mentioning any of their names, he being dead at the time. Held, the securities were valid.

(*m*) In Maine, one in possession of notes, and the mortgage securing them, cannot maintain an action upon the latter without a written assignment of it. Lyford *v.* Ross, 33 Maine, 197. Nor does the sale of a note operate as a legal transfer of the mortgage by which it is secured. Warren *v.* Hamstead, 33 Maine, 256. (See ch. 11.) The assignment of a mortgage, in Pennsylvania, carries with it the claim against the mortgagor, and all the securities which the assignor holds against the mortgagor or other parties for the debt. Phillips *v.* Bank, &c., 18 Penn. 394.

had no interest that his creditors could reach, as the assignment was complete and absolute, and the re-delivery to him, not apparently fraudulent, did not affect F.'s rights; and that F.'s liability on the note was a good consideration for the assignment.[1]

44. The *acknowledgment* is no part of an instrument of assignment.[2]

45. An assignee is, in general, subject to the same terms of redemption as the mortgagee.[3]

46. The assignment of a mortgage so far divests the title of the mortgagee, that he has no power to discharge the mortgage or any part of it.[4] Thus, in case of a mortgage to secure a bond, the mortgagee transferred the securities, and afterwards the mortgagor conveyed the land to him, taking a discharge of the bond and mortgage. Held, the discharge was invalid against the assignee.[5] And where the holder of a mortgage, having assigned it, afterwards received from the mortgagor his promissory note for interest in arrear; the note was held void for want of consideration, until the plaintiff affirmatively showed that the amount of the note had been applied on the mortgage debt. "Indeed the taking of the note after having parted with the mortgage, unless the matter can be explained, was nothing less than a downright fraud upon the defendant."[6] (*n*)

[1] Hall *v.* Redding, 13 Cal. 214.
[2] Livingston *v.* Jones, Harring. Ch. 165.
[3] Henderson *v.* Stewart, 4 Hawks, 256.
[4] M'Cormick *v.* Digby, 8 Blackf. 99.
[5] Brown *v.* Blydenburgh, 3 Seld. 141.
[6] Gillett *v.* Campbell, 1 Denio, 520, 522.

(*n*) On the other hand, an assignee may receive money in virtue of his mortgage, for which he will be liable to account *to the mortgagor*. Thus, the owner of property insured at a mutual office mortgaged it, and, with the assent of the company, made to the mortgagee an assignment of the policy, in terms absolute, and expressed to be for valuable consideration, but intended only as security for the mortgage debt. The mortgagee, afterwards, for valuable consideration, assigned the debt, mortgage, and policy, with the assent of the company to the latter assignment; and the debt was subsequently paid to the assignee by an assignee of the mortgagor, who purchased

47. Although the assignment of a mortgage divests the mortgagee of his title *to the land*, it does not pass rent due at the time of assignment, without express words to that effect. Lord Chancellor Truro says: — "The question is, what passes, generally speaking, by the assignment or conveyance of a mortgage? Does it pass all the future rents that are to become due only, or does it pass all the rents at that time in arrear, to the mortgagee? One would think that was a very ordinary principle. Men are in the habit of conveying estates day by day, conveying the fee. Well, what passes by that? Do the by-gone rents in arrear pass by such a conveyance? If they do not, what is the rule of law that makes a difference, that the conveyance of the mortgage shall transfer by-gone rents, when the conveyance of the whole estate would not do that, but leave them perfectly unaffected?"[1]

48. The assignment of a mortgage operating to divest the

[1] Salmon *v.* Dean, 5 Eng. Rep. 107, 111; 15 Jur. 641.

---

with an agreement to pay the mortgage; and the mortgage discharged. The assignee of the mortgage, after the expiration of the policy, received the return premium, and the mortgagor brings assumpsit against him to recover it. Held, though the defendant might receive such premium as attorney for the plaintiff, he was bound to pay it over to him. Felton *v.* Brooks, 4 Cush. 203. Shaw, C. J., says (Ibid. 206): "Brooks received the whole of his mortgage debt of Rice, from a fund provided by the plaintiff, and the rights of the plaintiff are the same as if he had paid the whole of the mortgage debt of the plaintiff in money. The conclusion seems inevitable, that the money received by Brooks on the policy as a return of the premium was received by him to the use of the plaintiff; and not having applied it, or had occasion to apply it to the payment of the plaintiff's debt, he is bound in good conscience to pay it to the plaintiff. The sum received by Brooks was received after he had been paid his mortgage debt in full; it is clear, therefore, that he received it on a security which ought to have been surrendered to the plaintiff, and, of course, to his use. But if he had received it before, his failure to apply it towards the mortgage debt, and receiving the whole from Rice, who, as between him and the plaintiff, was bound to pay the whole as part of his purchase-money, is ample proof that Brooks held the return premium to the plaintiff's use."

mortgagee's title, a bill to foreclose cannot be brought in his name, for the use of the assignee.[1] (*o*) It is said, — "This proceeding is, in the main, a chancery proceeding, and must be conducted according to the rules of equity pleading. It is incompetent and unavailing, therefore, to sue, for the purpose of foreclosing a mortgagor's equity of redemption, in the name of the mortgagees, for the use of another person. A court of chancery could take no cognizance of such a beneficiary." But where the mortgagee assigns his mortgage as security for an advance of money, which he also covenants to pay, he stands to some extent as a surety, and cannot be enjoined by the assignee from suing the mortgagor upon his covenant, unless the assignee release him from his own covenant, and reconvey any estate of the mortgagee included in the second mortgage.[2] So, where an assignment is made by an instrument not under seal, nor attested, acknowledged, or recorded; the mortgagee may maintain a *scire facias* for the benefit of the assignee.[3]

49. Where the assignee of a mortgage has entered to foreclose, and afterwards releases to the assignor "all the estate, right, &c., by force of the conveyance made thereof by him, &c., to hold in like manner as if he had never conveyed the same, &c.;" the assignor may avail himself of the entry for the purpose of foreclosure.[4]

50. If a purchaser from the mortgagor, pending a bill against the latter for foreclosure, takes an assignment of the mortgage, he acquires all the rights of the mortgagor, discharged of incumbrance; but he may proceed with the suit, (especially if the mortgagee does not object,) to a decree of foreclosure and sale, in order to perfect his title.[5] So it has been held that the owner of the equity, uniting it with the

[1] Barraque *v.* Maunel, 2 Eng. 516; Pryor *v.* Wood, 31 Penn. 142.
[2] Gurney *v.* Sepping, 2 Phill. 40.
[3] Partridge *v.* Partridge, 38 Penn. 78.
[4] Cutts *v.* York, &c., 6 Shepl. 191.
[5] Mobile, &c. *v.* Hunt, 8 Ala. 876.

(*o*) In Missouri, the assignee of a mortgage may sue for the *debt* in his own name. Crinion *v.* Nelson, 7 Mis. 466.

mortgage, may sue out a *scire facias* in the mortgagee's name against the mortgagor, with notice to himself, recover judgment, and sell the estate.[1]

51. It is no defence to an action of ejectment, brought by a mortgagor against a third person, that before commencement of suit the latter paid the money due on the bond secured by the mortgage; although, since the commencement of suit, he has taken a formal assignment of the mortgage; such payment giving the defendant only an *equitable* title to the land.[2]

52. In the following case, one claiming to be an equitable assignee was held not entitled to pursue an action commenced by the mortgagee. Mortgage by tenants in common to secure the debt of one of them. The tenants afterwards transferred their respective titles to different purchasers, who made partition. The mortgagee then brought separate actions against such purchasers, for their respective portions of the land; and the purchaser from the debtor, to whom, at the time of purchase, notice was given that he would be bound to pay the mortgage, paid the whole amount due, in discharge of the suit against him, under an agreement that he should thereby become owner of the mortgage. Held, he was not entitled to pursue the action against the other purchaser, in order to compel him to contribute half of the debt.[3] Shaw, C. J., says:[4] — "This claim, on the part of Green, is purely equitable, in the nature of an equitable assignment; and if he cannot maintain it on this ground, he cannot maintain it at all. If the payment made by Green was, strictly speaking, a payment of the whole mortgage, it would be a bar to both actions, both being brought to recover payment of one and the same debt. But supposing it intended to be a payment of one half, and a purchase of the plaintiff's right to the other half, the Court are of opinion that Green has no equity. He took Daniel S. Workman's right only, and that

[1] Moore *v.* Harrisburg, &c., 8 Watts, 138.
[2] Den *v.* Dimon, 5 Halst. 158.
[3] Cook *v.* Hinsdale, 4 Cush. 134.
[4] Ibid. 137.

right was to redeem the estate upon the full payment of Daniel S. Workman's debt. Sidney S. Workman's estate, which came to the defendant, was liable for it in law, but it was in the nature of a suretyship. If the suit had been brought against Green alone, to charge the whole mortgage debt on the estate held by him, we think he would have had no claim for contribution from the tenant in this case. In paying the whole mortgage, he in effect paid the debt for which his estate was primarily bound, to the exemption of the estate of the tenant; and he was in effect paying his own debt; he had no right in equity, therefore, to prosecute this suit for his own benefit in the name of the nominal plaintiff."

53. A mortgagee, who has assigned his bond and mortgage, with guaranty, may take further security in his own name from the mortgagor, without the knowledge of the assignee, but which will enure to his benefit. And the mortgagee may have the benefit of such security, till fully indemnified from the guaranty. A subsequent creditor, who would oblige the mortgagee or his assignee to satisfy his debt from the mortgage security, must make the assignee party to a bill for that purpose; otherwise, no sale can be decreed, in order to ascertain the sufficiency of the security.[1]

54. The assignment of a mortgage may acquire additional efficacy from acts done after such assignment by the assignor. Where a mortgage is assigned, any interest subsequently acquired by the assignor enures to confirm the assignment.[2]

55. It is said in an old case, "if a mortgagee in possession assigneth over, if the mortgagor prefer his bill, upon supposition that the debt is satisfied, and to have an account of the surplus; there he must make the mortgagee and all the assignees parties."[3] (See *Parties.*) But the later doctrine is, that if the mortgagee, not in possession, assigns the mortgage, with the concurrence of the mortgagor, he need not be made party to a bill for redemption; otherwise,

[1] Evertson *v.* Booth, 19 John. 486.
[2] James *v.* Morey, 2 Cow. 248.
[3] 2 Freem. 59.

where the mortgagor does not thus concur.[1] And where a mortgagor files a bill against the assignee of the mortgage, praying an account of what is due for principal and interest, and also for rents upon a lease made by him to the mortgagee, and for permission to redeem; the mortgagee should be made a party defendant.[2]

56. Where the assignee of a mortgage files a bill for foreclosure against the mortgagor, it is held that the mortgagee need not be made a party, though an account is to be taken of the rents and profits during his possession; because the amount may be proved by other evidence, and the mortgagee would not be bound by any judgment in the suit, nor could any relief be had against him.[3]

57. With regard to *the consideration* of an assignment, it is held that such consideration is open to inquiry, as much as that of the indorsement of the accompanying note.[4] But a mortgage is not affected by selling it for less than its nominal value.[5] (*p*) And the defendant in a foreclosure suit

[1] 1 Pow. 152.
[2] Wolcott *v.* Sullivan, 1 Edw. 409.
[3] Whitney *v.* McKinney, 7 John. Ch. 144.
[4] Bennett *v.* Solomon, 6 Cal. 134.
[5] Warner *v.* Gouverneur, 1 Barb. 36. See Pryor *v.* Wood, 31 Penn. 142.

(*p*) Where *an assignee of the mortgagor* brings a bill in equity to redeem against the mortgagee and mortgagor, he must prove a valuable consideration for the assignment. The following remarks of Ruffin, C. J., refer to an important and probably well-settled distinction upon this subject: — "If this had been the case of an ordinary mortgage upon its face, and Hough had made a formal deed of assignment of the equity of redemption to the plaintiff, he might have filed a bill against Mask for redemption, without bringing Hough into the cause, or proving the consideration moving from himself to Hough, as the price of the equity of redemption. For a plaintiff need not make a person a party, who according to the facts alleged in the bill has no interest in the subject, and although it requires a consideration to raise a trust, yet, after it is well raised, it may be transferred, as against the trustee, voluntarily. To Mask it would be immaterial upon what consideration Hough might have assigned it to the plaintiff; and it would therefore be sufficient, in the case supposed, for the plaintiff to prove the assignment, on the hearing. We do not say that it would be so in this case, since it is in form not an assignment of a clear and admitted equity of redemption, but

brought by an assignee cannot inquire into the consideration of the assignment, except with reference to the claim of payment or set-off.[1] Upon similar ground, in a suit to foreclose by the assignee of a mortgage, an answer, that the original mortgagee, and not the assignee, was the real party in interest, was held bad on demurrer.[2] Where the assignee purchases for less than the amount due on the mortgage, it has been suggested that he would be entitled to claim only the sum actually paid. But the rule seems well established to the contrary; except in cases of trust, express or implied, for the owner, who would then be entitled to the benefit of any advantageous bargain of the assignee. Generally, in order

[1] Adair *v.* Adair, 5 Mich. 204.

[2] Lamson *v.* Falls, 6 Ind. 309.

---

an assignment of a covenant or executory agreement from Mask to Hough to convey the land to him upon the payment of a certain sum. Perhaps, therefore, it was indispensable in this case, that the plaintiff should bring in Hough, as well as the mortgagee. But, admitting that it was not, and that the plaintiff might have had a decree upon a bill against Mask alone, yet he has not thought proper to proceed in that way and claim a decree against the mortgagee upon the apparent assignment to him, leaving it to the assignor to assert his right afterwards in a bill of his own, denying the assignment or its legal efficacy. On the contrary, the plaintiff has chosen to proceed against both the mortgagee and mortgagor; and thus he puts, himself, in issue, the assignment in respect of both those parties, and is, consequently, bound to show one which is efficacious, and which the Court will specifically uphold against the assignor, so as to conclude him by a declaration of the assignment in the decree in this suit. Hence it became necessary in the bill to set out not only the naked fact of the assignment from Hough to Medley, but also that it was made on a valuable consideration. Equity does not act for a mere volunteer, but only for a real purchaser, at a fair price. The plaintiff has endeavored to be such a purchaser. But he entirely fails in the attempt. It is urged for him, that the assignment itself states, that he had fully paid and satisfied Hough for his interest in the land, and that such an acknowledgment is not to be disregarded, but must be deemed sufficient evidence *primâ facie* of a valuable consideration. But in equity there must be proof of an actual consideration; and these general words, inserted merely as formal parts of an instrument, can by no means be admitted as conclusive, that some valuable consideration was actually paid or secured, much less that an adequate consideration was paid or secured." Medley *v.* Mask, 4 Ired. Eq. 343–345.

to redeem, the amount due on the mortgage must be paid.[1] In a case above referred to,[2] Edmonds, J., says: — "But if it was a loan, and usurious in its character, so far as to vitiate the title of the Life and Trust Company, as soon as the loan was discharged the taint would be removed, and the mortgagor would cease to have anything to complain of. I am not aware that the prohibitions against usury have ever been carried so far, as to determine that an obligation untainted in its concoction is rendered void, and the debtor discharged from all liability upon it by the simple fact that the owner had hypothecated it as security for a usurious loan. The relation of principal and surety does not in fact exist between Warner and Gouverneur's executors. As between them, he is the debtor, and they the creditors. It is only between them on the one side, and the Life and Trust Company on the other, that the relation of principal and surety may be supposed to exist. When this bill was filed, that company had ceased to have any interest in the mortgage. Even the quasi relation of principal and surety had ceased to exist; and the parties had returned to their original position of debtor and creditor in a contract uncontaminated by any illegal consideration. It is therefore unnecessary to inquire, whether the transaction between Gouverneur and the Life and Trust Company was usurious or not, or if usurious, what the effect would be upon the rights or obligations of the mortgagor. It is enough to know that the contract which the executors are seeking to enforce is itself untainted with any illegality, and is held by them by a title equally uncontaminated. For if they take as purchasers from the company, it was not illegal to buy or sell the security below par; and if they retake as borrowers who have paid up the loan, they have removed all taint, and are restored to their original rights as against the mortgagor." So a purchaser, subject to a mortgage, cannot offer evidence, that it was assigned for a less amount than was secured by it; and where he

[1] Coote, 355; Pease v. Benson, 28 Maine, 336.

[2] 1 Barb. 39.

gives further security for the forbearance of the assignee, the former mortgage is not void from usury, but the assignee, on foreclosure, must credit all such additions.[1]

58. Where notes, secured by mortgage, were, with the mortgage, assigned by the payee in payment *for slaves* introduced into the State contrary to law; held, the mortgage might still be enforced by the assignee.[2]

59. Where an assignment of a mortgage is made to several, each of whom advances his own portion of the consideration, and, by the express terms of the assignment, is to acquire a proportional interest in the mortgage; if the portion advanced by any one is fully paid by the mortgagor, and accepted by such one, his interest in the mortgage is fully discharged.[3]

60. It has been a question much discussed, how far the assignee of a mortgage is bound by the actual state of the account between the mortgagee and mortgagor at the time of assignment; that is, whether he may claim what appears to be due upon the face of the mortgage, or only what is really due, after deducting all payments and offsets. (*q*)

61. In the case of Matthews *v.* Wallwyn,[4] Baker having taken a mortgage from Matthews for £2,000, which was paid by Shepheard, the attorney of the latter, Matthews gave Shepheard a bond for £2,000, and Baker assigned the mortgaged estate to Shepheard, who afterwards deposited the bond and deed with Hercy, for £2,000. Hercy requiring payment, Shepheard applied to Wallwyn for a loan of £2,000, who agreed to open an account with him on a deposit of the securities and his own note. The securities were accordingly redeemed from Hercy, and deposited by Shepheard with Wallwyn. Shepheard became bankrupt; and, under a

[1] Lovett *v.* Dimond, 4 Edw. Ch. 22.
[2] Rowan *v.* Adams, 1 S. & M. Ch. 45.
[3] Furbush *v.* Goodwin, 5 Fost. 425.
[4] 4 Ves. 118.

(*q*) The assignee of a mortgage is not estopped to deny the mortgagor's title. Great Falls, &c. *v.* Worster, 15 N. H. 412.

decree of chancery, his assignees assigned the mortgage to Wallwyn. Matthews had no notice of the dealings with Hercy and Wallwyn. Shepheard had been in the habit of receiving and paying large sums on account of Matthews. Matthews files a bill against Wallwyn for redemption; and it was stated, that after settlement of an account between Matthews and Shepheard in October, 1794, which was subsequent to the deposit to Wallwyn, Matthews discovered that Shepheard had received sums not accounted for by him, and other sums since the settlement, which being deducted, a considerable balance would be due to Matthews. Wallwyn claimed a specific lien for their balance. The Lord Chancellor stated the question to be, whether the assignee of a mortgage could claim whatever appeared to be due by the instrument itself, without regard to the state of the account between the mortgagee and mortgagor. He also noticed the practice of conveyancers to make the mortgagor a party to any assignment, in order to secure a perfect title; and referred to the case of Lunn *v.* Lodge, of which he had a note. In that case, Lodge mortgaged to Pitman, who assigned to St. John. The mortgagor and mortgagee having both become bankrupt, the assignees of Lodge file a bill in equity, alleging that nothing was due between the estates. Lord Thurlow ordered the master to inquire, what was due at the time of the mortgage; what at the time of assignment; and what remained due; and he reported $7,000 due from Pitman to Lodge. Held, the assignments should not avail against the estate of Lodge. The Lord Chancellor relied upon this case, as a direct authority in favor of the plaintiff in this bill; decreed, that he might redeem upon payment of the sum due on the original mortgage to Shepheard; and ordered an inquiry by the master in the same form as above stated in the other case.

62. And, in conformity with this decision, the general rule is, that an assignee takes the mortgage subject to all equities between the original parties, more especially where he is guilty of laches, or where the assignment is made to secure a

preëxisting debt.[1] (*r*) Thus fraud in procuring a note or bond, and mortgage, may be set up against an assignee.[2] More especially if transferred with notice of the fraudulent purpose of their inception.[3] So a mortgage was given by a party against whom an action had been brought, without consideration, and for the purpose of defeating the execution in such action. The mortgage was made, subject to the direction, and for the benefit, of the mortgagor, and to be cancelled after termination of the suit. Held, the mortgage could not be foreclosed, even by an assignee for full consideration and without notice.[4] So an assignee with notice is bound by a promise of the mortgagee to repay from the land money expended on it.[5]

63. The doctrine is made to rest in part upon the ground, that this would be the rule adopted in a suit at law upon the covenant or bond to which the mortgage is collateral; and the assignee should stand no better in equity than at law.[6]

64. As against an assignee, even without notice, the mortgagor has the same rights as he has against the mortgagee, and whatever he can claim, in the way of set-off or mutual credit, as against the mortgagee, he can claim equally against the assignee. And if it is stated in the assignment, that a certain sum is due for principal and interest, although the mortgagee is bound by the statement, the mortgagor is not, unless a party to the assignment.[7]

[1] Glidden *v.* Hunt, 24 Pick. 221; Clark *v.* Flint, 22 Pick. 231; U. S. *v.* Sturges, Paine, 525.
[2] Marshall *v.* Billingsby, 7 Ind. 250.
[3] Chamberlain *v.* Barnes, 26 Barb. 160.
[4] Westfall *v.* Jones, 23 Barb. 9.
[5] Godeffroy *v.* Caldwell, 2 Cal. 489.
[6] Matthews *v.* Wallwyn, 4 Ves. 118.
[7] James *v.* Morey, 2 Cow. 247; Wolcott *v.* Sullivan, 1 Edw. 402; Norrish *v.* Marshall, 5 Mad. 481; Carew *v.* Johnston, 2 Sch. & Lef. 296; Hubbard *v.* Turner, 2 McL. 519.

(*r*) In Chambers *v.* Goldwin, 1 Smith, 252, it was held, that in general the assignee must take the risk of the correctness of the amount stated to be due; but if the mortgagor delays for a long time, and deals with the assignee without objection, he cannot have a decree to surcharge and falsify, but must take his remedy against the mortgagee.

65. But if the mortgage is given to secure a negotiable note, and both are assigned before maturity to a *bonâ fide* indorsee; he is held to take them, clear of any equities between the original parties.[1] (*s*) The mortgage passes as an incident to the note.[2]

66. So the assignee is not subject to the latent equities of strangers, of which he has no notice.[3] Nor is he required for his own protection to give notice of the assignment to a subsequent assignee of, or purchaser from, the mortgagee.[4] So, where one had acquired an equitable right to the assignment of a bond and mortgage, before an equitable right of set-off accrued to the mortgagor; held immaterial, that the mortgagor was ignorant of the equitable assignment, he not having parted with any security in consequence.[5] So a *bonâ fide* assignee of a mortgage does not take it subject to any equities between the mortgagor and his grantor, growing out of the fraud of the mortgagor in procuring the title to the land.[6] So, where one partner mortgages to another the effects of the firm, to pay a fictitious debt, a *bonâ fide* assignee of the mortgage, without notice, and for consideration, takes a good title.[7]

67. A bill against a *bonâ fide* assignee must allege notice of the complainant's equities against the mortgagee, in order to bind the defendant by them.[8]

68. The declarations of a mortgagee, made before the mortgage was due, are inadmissible as against purchasers under the mortgage.[9]

69. And in a late case in Maine, the general doctrine is

[1] Reeves *v.* Scully, Walk. Ch. 248; 3 Chand. 83; 4 Ibid. 153.
[2] Fisher *v.* Otis, 3 Chand. 83; Martineau *v.* McCollum, 4 Chand. 153.
[3] Pryor *v.* Wood, 31 Penn. 142.
[4] 2 Cow. 246.
[5] Smith *v.* Clark, 4 Paige, Ch. 368.
[6] Bloomer *v.* Henderson, 8 Mich. 395.
[7] Potts *v.* Blackwell, 4 Jones, Eq. 58.
[8] Cicotte *v.* Gagnier, 2 Mich. 381.
[9] Stark *v.* Boswell, 6 Hill, 405.

(*s*) But the transfer of a mortgage-note overdue subjects it to the same equities as if it were not secured by mortgage. Howard *v.* Gresham, 27 Geo. 317.

laid down, that the assignee of a mortgage, without notice, stands like a grantee of land without notice. Thus he was held not subject to a bill in equity, brought for the purpose of correcting a mistake, as to the quantity of land, in the deed to the mortgagor.[1]

70. The assignee will not be subject to any payments or set-offs which occur after the assignment, and notice thereof to the mortgagor. And implied notice is sufficient. Thus A.'s wife joined in a mortgage, to secure the payment for two hundred and fifty shares of a bank, to which A. had subscribed. The mortgage was assigned to trustees, by a resolution of the directors, to secure B. for debts due to him from the bank. After the assignment, A. made several transfers of stocks which were refused by B., to pay the mortgage, and also made loans to the bank after that time. In a suit by the special receiver of the bank to foreclose the mortgage, which had been assigned to him by the trustees, and also by the general receiver of the bank; held, a banking corporation, under the general banking law, had the right to divide its business, and appoint separate committees of its directors to the different departments of business; that a resolution of the committee of directors, having in charge the securities and investments of the bank, was valid to assign a mortgage, and the ratification of the resolution, by the whole board of directors, was a compliance with the statute requiring a transfer of over $1,000 to be made by a resolution of a board of directors; that the assignment at once vested the mortgage in those for whose benefit it was made, and the beneficiary, who had paid a valuable and adequate consideration, and who did not appear to have any notice of its illegality, at once became the assignee of the mortgage; and that the set-offs, which A. claimed, as they accrued to him after the assignment, of which, as he was chairman of the finance committee, he was presumed to have notice, and arose by his payment to the bank, and not to the assignee, could not be allowed.[2]

[1] Pierce *v.* Faunce, 47 Maine, 507.

[2] Palmer *v.* Yates, 3 Sandf. 137.

71. The question has arisen, how far the assignee of a mortgage is subject to an offset on the part of the mortgagor, growing out of a *lease* made by him to the mortgagee; upon which he would have had a valid claim for rent against the mortgagee himself. Upon this subject it is held, that, although a mortgagee is tenant to the mortgagor, in virtue of a lease executed at the same time with the mortgage, but without any agreement to connect the lease and mortgage inseparably, or that the rent shall be secured at all times by taking it out of the principal or interest of the money loaned; the right to set off rents against the mortgage debt does not necessarily attach as an inherent quality of the contract, so as to prevent an assignment of the mortgage, with the usual effect of such assignment. The assignee does not stand upon any ground more favorable, than if the mortgagor had permitted his mortgagee to take possession under the mortgage without a lease; in which case, upon assignment of the mortgage, the only equity which the mortgagor could claim would have been, to set off the amount of rents due at the time of receiving notice of the assignment. If a mortgagee is suffered to retain possession, the mortgagor, after an assignment without notice, cannot charge the assignee with subsequently accruing rents. His remedy is, to evict the original mortgagee, or compel him to account and pay an occupation rent for the time he may thus hold possession after assignment. So, in the present case, though the mortgagor could not enter, after notice of the assignment, except for non-payment of rent under the lease; yet, by virtue of the covenants, he could have pursued that and other legal remedies for the recovery of the possession, or the rents as they fell due. With these remedies, secured by express contract, he must be presumed to have been content, till the contrary appears. Another ground for this decision is, that, if the mortgagor had distrained for rent, the assignee of the mortgagee could not have set off the interest against such rent, either in law or equity.[1]

[1] Wolcott *v.* Sullivan, 1 Edw. 399.

72. After a mortgagor had conveyed his equity of redemption, the mortgagee levied upon the land an execution recovered in a suit upon the mortgage note. An assignee of the mortgage afterwards brings a suit to foreclose against the assignee of the mortgagor. Held, the price at the auction sale could not be set off.[1]

73. The assignment of a mortgage involves no implied guaranty as to the amount due thereon. Thus, in Bree *v.* Holbech,[2] an administrator with the will annexed found among the papers of the deceased a mortgage, and assigned it for full value, covenanting that neither the testator nor himself had done any act to incumber the mortgaged estate. The mortgage turned out to be forged; but, as there was no evidence that the administrator knew it, Lord Mansfield held that the purchaser could not recover back what he had paid; remarking, that the administrator "did not covenant for the goodness of the title, but only that neither he nor the testator had incumbered the estate. It was incumbent on the plaintiff to look to the goodness of it." So, on the other hand, where the distributee of an estate has received from the executors the assignment of a mortgage, to meet his share of the assets, he does not thereby guarantee the sufficiency of the mortgaged property to extinguish the amount for which it was pledged, and become personally liable to the executors for the nominal excess of the mortgage over his proportion of the estate. He is only bound to use diligence and good faith in the collection of the mortgage, and pay over any surplus, of its actual proceeds, after satisfying his own claims.[3] (*t*)

74. To avoid the inconvenience and hardship of charging

[1] Hollister *v.* Dillon, 4 Ohio, N. S. 197.

[2] Dougl. 655.

[3] Hammond *v.* Washington, 1 How. 14.

(*t*) In the appropriation of the proceeds of a sheriff's sale, the assignee of a mortgage which has priority of lien will be preferred to a judgment creditor, who holds the guaranty of the mortgagee for his judgment, though prior in date to the assignment. Moore's Appeal, 7 W. & S. 298.

an assignee with deductions and discounts of which he may have had no notice, the practice has been recommended, of making the mortgagor a party to the assignment of the mortgage, thus, of course, precluding him from a denial, that the face of the mortgage exhibits the true state of the mortgagee's claim. Upon this subject Lord Loughborough remarks as follows: "It was supposed that in practice there is no occasion to make the mortgagor a party, and in some cases it may not be possible to make him a party to the assignment; and to hold that the assignee of a mortgage is bound to settle the accounts of the person from whom he takes the assignment, would tend to embarrass transfers of mortgages. I have got all the information I could, and I think I have got the best. The result is, that persons most conversant in conveyancing, hold it extremely unfit and very rash and a very indifferent security, to take an assignment of a mortgage without the privity of the mortgagor as to the sum really due. No conveyancer of established practice would recommend it as a good title to take an assignment of a mortgage without making the mortgagor a party, and being satisfied that the money was really due." [1]

75. An additional reason for the course recommended is stated as follows: — A mortgagee in possession being regarded in some sense as *trustee*, and therefore accountable in equity for the profits, if he assign the mortgage without the mortgagor's consent, he will be held accountable for the subsequent profits; because, having turned the mortgagor out of possession, he is bound to take care in whose hands he places the estate.[2]

76. Chancellor Kent says,[3] more particularly with reference to the *recording* of assignments: "The abuse to which these clandestine assignments of mortgages (and which, in judgment of law, are extinguished by merger) are subject, ought to impose upon persons who traffic in such securities the

[1] Matthews *v.* Wallwyn, 4 Ves. 128; 1 Pow. 152.

[2] Coote, 354; 1 Eq. Cas. Abr. 328; 1 Pow. 152.

[3] James *v.* Johnson, 6 Johns. Ch. 432.

duty of making their assignments, as soon as possible, matter of record. If they do not, it is their own fault or negligence, and they ought to suffer, rather than the subsequent purchaser, who is deceived by appearances, and has no notice or record to guide him. I am more and more inclined not to extend equitable refinements upon the plain common-law doctrine of merger. They never have been and never ought to be carried so far as to affect a subsequent purchaser, or judgment, or mortgage creditor, without notice."

77. A purchaser of mortgaged property does not make himself liable for the mortgage debt, merely by becoming party, or giving his assent, to an assignment of the mortgage. Thus A., B., and C. became entitled to mortgaged property, unequally. A deed was executed, reciting that the mortgagee had required payment of the debt, from A., B., and C., *pro ratâ*, that they "were unable to pay it, and had applied to D. and E. to advance the amount, which they had consented to do, upon having repayment, with interest, secured as thereinafter stated;" and proceeded to transfer the mortgage security to D. and E., subject to redemption on payment of principal and interest by A., B., and C., *pro ratâ*, on a day newly fixed; and A., B., and C. covenanted to pay accordingly, and also gave a bond of even date with the mortgage. Held, merely a transfer of the mortgage; and after the deaths of A., B., and C., their personal estate was not liable for the debt.[1]

78. But if a mortgagor induces a third person to purchase the mortgage, by promising in writing to pay, with interest, the whole sum advanced; an assignee of the mortgagor cannot redeem without paying such sum.[2]

79. A mortgagor incurs no special liability in consequence of the assignment of the mortgage *in trust*. The rule in equity, of responsibility for the application of a trust fund, does not apply to such a case. Thus, where a mortgagee assigned his mortgage and the accompanying bond and war-

[1] Hedges *v.* Hedges, 12 Eng. Law & Eq. 331.

[2] Holbrook *v.* Worcester, &c. 2 Curt. 244.

rant to two trustees, in trust for the use of his daughter and her children; held, payment to one of the trustees discharged the debt.[1] The Court say: "Between the mortgagor and the mortgagee, the money was not a trust fund. It was an ordinary debt for the price of the property, on which the mortgage stood as a security; and what mattered it to the mortgagor, that the mortgagee assigned the mortgage in trust for a stranger? He could not change the nature of the original relation, or increase his debtor's responsibility and risk on the score of mispayment. A purchaser from trustees, knowing that he must see to the application of the purchase-money, knows what he has to encounter when he makes his bargain, and he takes the responsibility accordingly. But he incurs no responsibility of which he was not apprised; for where the sale is for a breach of trust, he is not affected by it if he knew not of it. There was no trust in existence when this mortgage was executed, and the assignment did no more than substitute joint creditors for a single one. It is very clear, then, that payment to a joint creditor, of which his receipt is evidence, discharges the debt."

80. It is the general, and probably universal practice, in the United States, to *record* or *register* the assignments of mortgages, as well as the mortgages themselves.

81. In reference to a subsequent purchaser from the mortgagor, even without notice, an assignment for valuable consideration is held valid without registry.[2] (*u*)

82. The question has arisen, whether such registration is equivalent to actual notice of the assignment, in reference to the mortgagor, or other parties, subsequently dealing with the mortgagee.

[1] Bowes *v.* Seeger, 8 W. & S. 222, 223.

[2] Wilson *v.* Kimball, 7 Fost. 300.

(*u*) Though the assignment be not recorded, still, if the mortgagor have notice of it, his claim for an account and for redemption is to be made upon the assignee. Otherwise, where he has no notice. Mitchell *v.* Burnham, 44 Maine, 286.

83. In a leading case in England,[1] the defendant mortgaged to Clifton, who assigned to the plaintiff without the defendant's concurrence, after which the defendant made payments to Clifton. The property was leasehold, in Middlesex, and the assignment registered. The assignee files a bill for foreclosure, relying upon the registry as notice to the defendant; but it was decreed that he might redeem on payment of the balance, after deducting the sums paid the mortgagee. (*v*)

[1] Williams *v.* Sorrell, 4 Ves. Jun. 389; acc. 4 Ves. 118; Coote, 441.

(*v*) It was formerly held in New York, that a mortgagor may make a valid payment of the mortgage debt to the mortgagee, notwithstanding the registration of an assignment of the mortgage, unless he have *actual* notice; such registration being legal notice only to those claiming under a subsequent transfer from the mortgagee or his representatives. New York Life, &c. *v.* Smith, 2 Barb. Ch. 82; 2 Cow. 246. But, under the Revised Statutes, the registration of an assignment is constructive notice of it. Vanderkemp *v.* Shelton, 11 Paige, 28. In Williams *v.* Birbeck, 1 Hoffm. Ch. 359, it was held that no one is chargeable with constructive notice of an instrument from its being recorded, unless the law requires registration. Acc. Dutton *v.* Ives, 5 Mich. 515. In Roberts *v.* Jackson, 11 Wend. 485, Savage, C. J., says: "The recording of an assignment of a mortgage is not necessary to its validity; but that it may be recorded, and its execution proved, in the same way as a mortgage. In Williams *v.* Birbeck, 1 Hoffm. Ch. 359, the opinion is expressed, that since the Revised Statutes, an assignment of a mortgage must be recorded, to protect the assignee against a subsequent assignment without notice. In a late case, it is held that registration of an assignment is notice to all the world except the mortgagor and his representatives. Ely *v.* Schofield, 35 Barb. 330.

It has been held in Pennsylvania, that the assignment of a mortgage need not be recorded. Mott *v.* Clark, 9 Barr, 399. (See Craft *v.* Webster, 4 Rawle, 265; Porter *v.* Seabor, 2 Root, 146.) By Stat. 1849, (p. 527,) assignments *may be* recorded, and the record will be evidence. In the same State, the certified copy of the assignment of a mortgage is evidence. Philips *v.* Bank, &c. 18 Penn. 394. In Wisconsin, (Rev. Sts. 329,) registration is not notice; but the mortgagor may make payment to the mortgagee. See Clark *v.* Jenkins, 5 Pick. 280; Pierce *v.* Odlin, 27 Maine, 341.

In Texas, under the statute, an assignment of a mortgage should be recorded, as an agreement relating to land. Henderson *v.* Pilgrim, 22 Tex.

84. An assignee takes subject to the equities of the mortgagor, but not to latent equities of his *cestuis que trust* or other persons. Thus a trustee under a secret trust conveyed to his cestui, and then mortgaged to one having notice of such conveyance. The mortgagee assigned to one not having notice, who re-assigned to another, the assignment not being recorded. After the first and before the second assignment, the conveyance to the cestui was recorded. Held, the assignee was not affected by this registry, nor by notice to the mortgagee of the trust and conveyance.[1] But, on the other hand, it is held that the assignee does not succeed in all cases to the benefits of a trust of which the mortgagee might avail himself. Thus a married woman purchased land, taking a deed to herself, and giving a note and mortgage to A., who advanced part of the purchase-money. The securities being assigned to the plaintiff, he brings a bill in equity, alleging that the loan was procured by the fraud of the mortgagor. Held, if a trust thereby resulted to A., no such trust passed to the plaintiff.[2]

85. The title of an assignee may be impeached by evidence of any fraud on his part, or to which he is privy. Thus, if a mortgage is, on its face, fraudulent, an assignee, though he take it in good faith, stands in no better condition than the mortgagee.[3] So, where assignment of a bond and mortgage was obtained by false pretences, which constituted a fraud and felony; and the assignee transferred them for less than their value, and under circumstances calculated to put the second purchaser on inquiry: held, the latter gained no

[1] Mott *v.* Clark, 9 Barr, 399.
[2] Eaton *v.* George, 42 N. H. 375.
[3] Farmers' Bank, &c. *v.* Douglass, 11 S. & M. 469.

464. If it be not recorded, a *bonâ fide* purchaser from the mortgagor, who at the same time receives a release and discharge from the mortgagee, holds clear of the mortgage, notwithstanding a previous assignment of which he has no notice. Ib. In the same State, the assignee of a debt and mortgage, by an assignment not under seal, has but an equitable estate, and therefore cannot be preferred to a releasee of the mortgagee without notice, and for a valuable consideration. Ib.

title to the securities, and it was decreed that the assignments were fraudulent and void as against the original holder, and that the second purchaser should re-assign the bond and mortgage, and refund the amount collected by him, with interest.[1] And an assignee may be affected by the unfair dealing of the mortgagee, even though subsequent to the assignment, and though the former is no direct party to it. Thus a mortgage was given, conditioned for the payment of $800 in five years, with interest annually; the whole debt to become due upon failure to pay interest when payable. The mortgagee, having assigned the mortgage, and guaranteed its payment, shortly before an instalment of interest fell due, informed the mortgagor of the assignment, but not of the assignee's residence, and the mortgagor, unable to find the assignee, made a tender to the mortgagee, who refused it. Upon a bill to foreclose, brought by the assignee, held, the tender was sufficient to prevent a forfeiture, or at least to justify a stay of proceedings, upon payment of the sum due, till further default; the facts showing a design on the part of the mortgagee and assignee to take an unconscientious advantage of the mortgagor, and that he was prevented from paying at the time appointed through their act and not his own default.[2]

86. Under some circumstances, the mortgagee may have no right to assign the mortgage. But, in order to affect an assignee's title, the notice of such want of authority must be clear and explicit. Thus, a bond and mortgage were made by a corporation to one of its directors, to enable him to raise money for the corporation by assigning them, and on his representation that he could not raise the money upon securities running directly to the lender. The director negotiated the securities for his own purposes, taking from the assignee real estate therefor. Pending the negotiation, the assignor exhibited to the assignee certain certificates, signed by officers of the company, stating that the securities were binding upon the company, and that the amount thereof

[1] Peabody *v.* Fenton, 3 Barb. Ch. 451. [2] Noyes *v.* Clark, 7 Paige, 179.

was due the director, but, before the bargain was closed, the president told the assignee, that the company were anxious to procure the money and have the works in operation, and would be able to do it if they could get the money. Held, the mortgage might be enforced by the assignee against the company.[1]

87. How far notice of an outstanding title shall affect one claiming under the party who has such notice, is a question which has arisen in England in various forms. Thus it has been held, that, if one take a mortgage by assignment from a mortgagee having such notice, he will take subject to the adverse title; that the assignor cannot transfer a better title than he has himself. This principle, however, has been questioned. A similar question has been raised, as to the right of a third mortgagee, taking an assignment of the first mortgage, to *tack* it to his own, where the assignor had notice of the second mortgage. The better opinion would seem to be that *tacking* would be allowed, notwithstanding such notice.[2]

88. The rights of an assignee in relation to *foreclosure* may depend upon similar considerations of notice and implied fraud. Thus it is held, that a mortgage may be assigned after entry for the purpose of foreclosure, and the assignment will not necessarily affect such foreclosure. But if made in order to prevent a redemption, or immediately before the right of redemption would expire, it may keep the right of redemption alive, until a tender can be made to the assignee, being regarded in the former case as a fraud, of which the party shall not himself take advantage, and in the latter, as analogous to the case of payment, made to a mortgagee after assignment, but before notice of it.[3] (*w*)

[1] Van Hook *v.* Somerville, &c., 1 Halst. Ch. 633.

[2] Coote, 433.

[3] Deming *v.* Comings, 11 N. H. 474.

(*w*) While an assignee is in general subject to all equities between the original parties, on the other hand, he succeeds to the personal rights of the mortgagee. Thus a *succession sale*, in Louisiana, which by the charter of a bank, the mortgagee, is invalid against the bank, is also invalid against its assignee. Beatty *v.* Clement, 12 La. An. 82.

CHAPTER XIX.

VOID AND VOIDABLE MORTGAGES. — USURY.

1. General principle as to avoiding deeds.
2. Usury.
4. What constitutes usury in a mortgage.
12. What does not constitute usury.
22. Statement of questions arising in relation to usurious mortgages.
25. When the sum legally due may be recovered.
26. Distinction between a bill for foreclosure, and a bill to redeem, in relation to usury.
33. What parties may be affected by usury in a mortgage.
36. What parties may avail themselves of such usury.
40. What will preclude a mortgagor from setting up usury; effect of a prior judgment, &c.
41. Form of pleading usury.
44. Evidence — parol evidence.

1. In many respects, a mortgage is not distinguishable, with reference to the circumstances which render it void or voidable, from an absolute deed. Of course, however, this is not universally true. A mortgage, though in form *a conveyance of land*, is for many purposes a mere *executory contract*, like the personal obligation which it accompanies, and therefore admits of many defences or exceptions which cannot be applied to absolute, executed conveyances. And the general rule is laid down, that, with the exception of *limitation* or *bankruptcy*, the same defences may be made to a suit upon a mortgage, as upon the note which it is made to secure.[1] (*a*)

2. One of the common defences to a mortgage is *usury*, which cannot exist in connection with an absolute sale of land for a certain price, however excessive, but is a natural incident to conditional conveyances, made as security for loans of money.

3. If usury is set up against a bill for foreclosure, strict proof is required.[2]

[1] Bush *v.* Cooper, 26 Miss. 599; Vinton *v.* King, 4 Allen, 564.

[2] Richards *v.* Worthley, 5 Wis. 73.

(*a*) A mortgage may be void only in part, as where a *homestead* is included with other property. M'Murray *v.* Connor, 2 Allen, 205.

4. In regard to the question, what constitutes usury, there is no substantial difference between mortgages and other obligations or securities. It would be foreign from the plan of the present work, to go minutely into all the distinctions upon the subject. Some of the decisions relating particularly to mortgages are here subjoined. In many of the States, by virtue of express statutes, usury no longer renders any securities *absolutely void*, but merely involves certain forfeitures of a portion of the amount promised. Of course those alterations of the law apply as well to mortgages as to other obligations. (*b*)

5. Action on a promissory note. Defence, that the plaintiff loaned to the defendant $800, and received as security an absolute deed of a piece of land of much greater value, with an agreement that the defendant might redeem it by repayment of the loan with 12 per cent. interest, and should remain in possession of the land and pay therefor $48 per annum, being the simple interest, as rent, for which rent the note was given. Held, the transaction was usurious and the note void.[1] So one person, through an agent, applied to another for a loan, at 15 per cent. interest, to be secured by mortgage. The party applied to declined taking a mortgage, but proposed to purchase the property for the sum named, and let it to the other for a rent equivalent to such interest, with the privilege of redeeming by payment of the sum advanced, and of the rent. The proposition was accepted, a deed made, and a lease taken back, in the terms above stated. Held, it was a question for the jury, whether the transaction was a real sale, or only designed to cover a usurious loan.[2] So a mortgage made to the indorsee of a usurious note, to se-

[1] Mitchell *v.* Preston, 5 Day, 100. [2] Tyson *v.* Rickard, 3 Har. & J. 109.

(*b*) See Vickery *v.* Dickson, 35 Barb. 96; Melville *v.* American, &c., 33 Barb. 103; Baxter *v.* M'Intire, 13 Gray, 168; Lockwood *v.* Mitchell, 7 Ohio, N. S. 387. As to the question of usury in the *assignment* of a mortgage, see Mumford *v.* American, &c., 4 Comst. 463; U. States Dig. 1852, "Usury."

cure it, is void, though he had no notice of the usury at the time of indorsement; especially if at the making of the mortgage he had such notice.[1] So, to a bill to foreclose a mortgage, which was made as security for a bond of $5,000 and interest, the defendant answered, that he received from the plaintiff, for the bond and mortgage, two checks for $4,658, payable in six months, without interest, his own note for $341.10 principal and interest, and ninety cents in cash; all of which allegations, except the last, were proved. Held, the answer was substantially established, and the transaction usurious.[2] So, where the holder of a usurious mortgage indorsed upon it an amount equal to the sum included in it for usury, with the assent of the mortgagor; held, the mortgage was void, notwithstanding such indorsement.[3]

6. It has been held, that an agreement to set the profits of the estate against the interest of the loan is usurious, if such profits exceed the legal rate of interest.[4] So, where a mortgage was given to secure the loan of $3,000, without any agreement about interest; and the mortgagee let the premises to the mortgagor at the annual rent of $270: held, an agreement for usurious interest.[5] (*c*) So, where land was conveyed for a consideration much less than its value, and to be reconveyed upon payment of the money loaned, with usurious interest; this was held a security for the payment of money, with usurious interest, and not an actual payment; and hence the statutory penalty was not incurred.[6]

7. In New York, a statute provided, that all bonds, &c., whereupon or whereby there shall be reserved, &c., or secured over 7 per cent., should be utterly void. Held, a mort-

[1] Morgan *v.* Tipton, 3 McL. 339.
[2] Lane *v.* Losee, 2 Barb. 56.
[3] Miller *v.* Hull, 4 Denio, 104.
[4] Robertson *v.* Campbell, 2 Call, 354.
[5] Gordon *v.* Hobart, 2 Story, 243.
[6] Thomes *v.* Cleaves, 7 Mass. 361.

(*c*) The only relief to which a mortgagor, in such case, is entitled, is to have the rate of interest cut down to the legal rate; and the assignee of the mortgagor is not entitled to be placed in a better situation, if he is entitled to any relief; which is held to be doubtful. Gordon *v.* Hobart, 2 Story, 243.

gage taken on a loan of money, including a former usurious loan, was void, the usury destroying the whole security; and that an action of ejectment could not be maintained for the land by an assignee of the mortgage.[1]

8. Stats. 2 and 3 Vict. c. 37, § 1, enabled parties to contract for more than 5 per cent., where the sum lent or forborne was over £10, but with a proviso that it should not apply to the loan, &c., of money upon security of any lands, tenements, &c. In Hodgkinson *v.* Wyatt,[2] this proviso was held applicable to a case, where the security consisted in an equitable mortgage by deposit of title-deeds to leasehold property.

9. In Bush *v.* Livingston,[3] a bond and mortgage were given for $6,000, and assigned by the mortgagee, by the procurement of the mortgagor, nominally for the whole sum, and under an agreement that they were to be available to the assignee for the $6,000 and interest, but upon which he had paid only $5,600, the remaining $400 being intended as a bonus for advancing the money. The assignee filed his bill of foreclosure against the mortgagor and his assignee in bankruptcy, and the answer set up usury as a defence. Held, the mortgage was valid in the hands of the plaintiff to the extent of $5,600 and lawful interest; and his recovery upon it was restricted accordingly, the transaction being a hard and unconscionable advantage taken by the lender of the mortgagor.

10. Bill in equity to foreclose a mortgage, conditioned that the mortgagor should pay the mortgagee, the plaintiff, the interest of 8 per cent. upon $1,000 of eight per cent. stock loaned by the plaintiff to the defendant, and should further pay him said sum of $1,000. Plea, the statute of usury, alleging that it was a loan of money and not of stock. It appeared in evidence, that the plaintiff authorized another person to sell $1,000 of eight per cent. stock, which he did through the agency of the defendant, who received the

[1] Jackson *v.* Packard, 6 Wend. 415.
[2] 4 Ad. & Ell. (N. S.) 749.
[3] 2 Caines' Cas. in Err. 66.

money. The plaintiff having endeavored without success to get from the defendant either the stock or money, it was finally agreed that the defendant should be considered responsible for the stock, and give a mortgage to secure repayment of it and 8 per cent. interest. Held, the contract was usurious, and the mortgage void.[1]

11. A bank may take a mortgage for a debt due, with 7 per cent. interest, (that being the legal rate,) notwithstanding it is prohibited by its charter from taking "more than 6 per cent. per annum, in advance, on its loans or discounts."[2]

12. A mortgage made in Connecticut for 7 per cent. interest, to indemnify the mortgagee against an obligation given in New York for 7 per cent., is not usurious.[3] So, where A. made a mortgage of lands in Connecticut, where he resided, to B., as security for a bond to him, and subsequently C. paid the bond, and took an assignment of the mortgage; held, A. could not redeem, without paying to C. the sum actually advanced by him, and 7 per cent. interest, being the legal interest of the State in which the land lay and the mortgagor resided.[4] So, where notes were made in Massachusetts, but purported to be made in Illinois, and were secured by mortgage of land in Illinois; and to a *scire facias* brought for foreclosure, the defendant set up as a defence usury under the laws of Massachusetts: held, the forfeiture provided by those laws affected the remedy only, and could not be enforced in Illinois.[5] So, where A., living in New York, sold to B., also living in New York, a tract of land in New Jersey, and took his bond for part of the consideration money, with 7 per cent. interest, (the legal rate in New York,) and his mortgage on the lands conveyed, to secure the bond; held, the mortgage was not usurious, though the papers were exchanged in New Jersey at the proper record office, they having been executed and acknowledged in New York, and

[1] DeButts *v.* Bacon, 6 Cranch, 252.
[2] Bailey *v.* Murphy, Walk. Ch. 424.
[3] Nichols *v.* Cosset, 1 Root, 294.
[4] Mallory *v.* Aspinwall, 2 Day, 280.
[5] Sherman *v.* Gassett, 4 Gilm. 521.

a sufficient reason being shown for not exchanging them there.[1]

13. Mortgage, to secure a certain sum of money at a certain time, with legal interest, and an agreement that, if the principal and interest should not be punctually paid, the land should be sold to pay the same, with five per cent. damages thereon and all costs. Held, the contract was not usurious.[2]

14. In a negotiation for the sale of land, the seller was willing to take $10,000 in cash, but, the person proposing to buy being unable to pay cash, it was agreed that a deed, and a bond and mortgage for $12,000, payable at a future time with interest, should be executed, to remain in the seller's hands, until he could negotiate a sale of the bond and mortgage, for a sum equal to the price he asked in cash for the land, and the deed then to be delivered. The papers were executed accordingly, the bond and mortgage afterwards sold for $10,000 cash, and the deed delivered at the same time. Held, this transaction was not usurious, and the bond and mortgage were a valid security for the sum of $12,000. Such a transaction, it seems, does not differ from the ordinary case of asking one price in cash for the property, and a higher price on credit, with the further condition, that the sale is not to be effected, until the security taken for the credit price can be sold for a sum of money equal to the cash price.[3]

15. Mortgage, payable in small annual instalments, which were not due. The mortgagor advanced $1,400 to the mortgagee upon the application of the latter, under an agreement that he would apply and indorse $2,100 as a payment on the mortgage. Held, this was not a loan nor forbearance, and therefore not usurious; and that the agreement was for good consideration and not unconscionable.[4]

16. A mortgage on a loan of $700, to be paid in ten years, with interest at the end of that time, is not usurious,

[1] Blydenburgh *v.* Cotheal, 1 Halst. Ch. 631.
[2] Gambril *v.* Rose, 8 Blackf. 140.
[3] Brooks *v.* Avery, 4 Comst. 225.
[4] Righter *v.* Stall, 3 Sandf. Ch. 608.

though in addition to the interest the mortgagee is to have, free of rent, the use of an acre of the land, worth $8 per year.[1]

17. The purchaser at a master's sale procured the conveyance to be made to trustees, to secure the payment to a third person of a loan alleged to be usurious. The purchaser and the trustees subsequently sold the premises, and took back a mortgage for part of the price, for the benefit of the lender, to secure the loan. Held, though the loan were usurious, the bond and mortgage were still valid.[2]

18. One holding a mortgage of a large tract, payable at a distant day, with 6 per cent. interest, at the request of the mortgagor took from him thirteen distinct mortgages on separate portions, for the same amount in the whole, with 7 per cent. interest, payable at the same time, thereupon cancelling the old mortgage, and receiving from the mortgagor $500 for granting the accommodation. Held, as there was no loan or forbearance, the transaction was not usurious.[3]

19. A., having made a deed of trust to secure a debt, under which a sale of the land was advertised, agreed with B., that B. should bid the amount of the debt, and, if he became the purchaser, that B. should resell the land to A., on his paying, within twelve months, a sum afterwards to be agreed upon, it being understood that the sum should be sufficient to fully reimburse B., including his trouble and expenses. B. became the purchaser. Held, the transaction was not usurious, and the estate became absolute in B., on A.'s failure to pay within twelve months, and the sum not being fixed within that time.[4]

20. A. mortgaged certain hereditaments to B. for £7,500, and his equity of redemption to C. for £5,000. D. afterwards agreed to take a transfer of both mortgages, and to advance a sum of £12,000 for that purpose, at interest at £5 per cent., reducible on prompt payment to £4 per cent. The

[1] Fox *v.* Lipe, 24 Wend. 164.
[2] Stoney *v.* American, &c. 11 Paige, 635.
[3] Neefus *v.* Vanderveer, 3 Sandf. Ch. 268.
[4] Jones *v.* Hubbard, 6 Call, 211.

transfer of the first mortgage not being ready to be executed, through the default of A., at the time appointed, D. advanced the £5,000 at once, and took a transfer of the second mortgage; at the same time A. signed a memorandum, acknowledging that the remainder of the money was ready, (which was the case,) and agreeing that interest on the first mortgage, when transferred to D., should run as from the date of that agreement, and that the deed of transfer of the first mortgage should bear date on that day. The deed of transfer of the first mortgage was not, in fact, executed, nor the £7,500 paid over to B., until nearly six weeks afterwards. Held, the transaction was nevertheless good under the statute 12 Anne, ch. 16, against usury.[1]

21. A mortgage, made for the purpose of being assigned upon a loan, and accordingly assigned for a loan at more than legal interest, is not usurious as between a subsequent purchaser and the mortgagor, unless the former knew the purpose for which it was made, at the time of the purchase.[2] And the validity of a mortgage and the liability of a mortgagor are not affected by its transfer as security for an usurious loan. Payment of such loan relieves the mortgage of all taint.[3]

22. In addition to the question, what constitutes usury in a mortgage, numerous cases have arisen, both in law and equity, involving the inquiries, whether a mortgage should be avoided for usury, only as against a mortgagee, seeking to enforce it by foreclosure or otherwise, or in favor, also, of the mortgagor, bringing a suit to redeem; what parties may avail themselves of this ground of avoidance; (*d*) and how far the original defect is cured by legal and judicial proceedings, treating the mortgage as a valid security.

23. In Massachusetts, it has been heretofore suggested as a doubtful point, whether, in a bill to redeem, the plaintiff

[1] Long *v.* Storie, 10 Eng. Law & Eq. 182.

[2] Jackson *v.* Colden, 4 Cow. 266.

[3] Warner *v.* Gouverneur, 1 Barb. 36.

(*d*) See Strong *v.* Strickland, 32 Barb. 284.

can legally seek to deduct penalties for usury from the amount due on the mortgage.[1] A late case, however, decides that this may be done.[2] But, in a suit for foreclosure, no such deduction shall be made on the ground of additional interest paid for delay to take possession; no contract to that effect having been made at the time of executing the mortgage.[3]

24. In New Hampshire, in a writ of entry upon a usurious mortgage, the defendant may claim the statutory, triple deduction from the debt, and the conditional judgment will be for the balance only; though the declaration does not show the action to be upon a mortgage.[4] (See § 41.)

25. In Pennsylvania, a usurious contract is not absolutely void. (*e*) Hence a mortgagee, in such case, may recover upon *scire facias* the amount loaned, with legal interest. The Court say: — "It would be unwarrantable to unsettle the law, merely because a general principle has lately been established, that courts of justice will not give redress on any contract which has been made contrary to law. To say that this contract was so contrary to the act of assembly, as to make the recovery of the just debt and interest improper, is begging the question, and directly in opposition to the construction established by practice, decision, and general acquiescence." [5]

26. In New York, in the case of Fanning *v.* Dunham,[6] the distinction was taken, that, if a lender of money on a usurious contract seeks to enforce his securities in a court of equity, and the usury is set up as a defence, the securities will be declared void, and ordered to be delivered up and

[1] Robinson *v.* Guild, 12 Met. 328. See Gordon *v.* Hobart, 2 Sumn. 402; 2 Story, 243; Divoll *v.* Atwood, 41 N. H. 443.

[2] Hart *v.* Goldsmith, 1 Allen, 145.

[3] Drury *v.* Morse, 3 Allen, 445.

[4] Briggs *v.* Sholes, 14 N. H. 262.

[5] Turner *v.* Calvert, 12 S. & R. 46, 47.

[6] 5 John. Ch. 122; acc. Ballinger *v.* Edwards, 4 Ired. Eq. 449; Woodard *v.* Fitzpatrick, 9 Dana, 117.

(*e*) In Indiana, a usurious mortgage is valid for the amount of the principal debt. Grimes *v.* Doe, 8 Blackf. 371.

cancelled. But where the lender has recovered a judgment at law on a bond and warrant of attorney, or is proceeding to foreclose a mortgage by virtue of a power of sale under the statute, without the aid of a court of equity; upon a bill for relief filed by the borrower against the judgment or other legal securities, on the ground of usury, he cannot have such relief without paying or offering to pay the sum lawfully due, whether the usury be established by proof, or admitted in the answer. In this case, Chancellor Kent goes into an elaborate examination of the authorities upon the subject of vacating *judgments* upon the ground of usury. He adds:[1] — "The same objection and difficulty occurs in the case of a mortgage taken to secure an usurious loan, with a power to sell annexed to it, by means of which the creditor forecloses his mortgage by an act *in pais*, without calling upon any Court to assist him. The debtor has no relief in that case, but by applying to this Court, and then he must comply with the terms of paying what was actually advanced. He deprives himself, in that case, by the power to sell, as he does in the other by his warrant of attorney to confess judgment, of an opportunity to appear in the character of defendant and plead the usury. These are cases in which the party by his own voluntary act deprives himself of his ability to inflict upon the creditor the loss of his entire debt. The party is in the same situation, if instead of resisting the usurious claim, he pays it. He cannot then expect assistance to recover back more than the usurious excess. If the warrant of attorney or the power to sell were procured by fraud, or surprise, or accident, that would form a distinct head of relief, and is nowise applicable to the case. And perhaps it is sufficient for the purposes of public justice and public policy, that the law has enabled a debtor, in every case in which he does not of his own accord deprive himself of the means, to plead the statute in discharge of his usurious contract, and of his obligation to pay even what was received, and that in all cases

[1] 5 John. Ch. 145; acc. Ballinger *v.* Edwards, 4 Ired. Eq. 449.

he can, by paying the actual principal received, and the lawful interest, be relieved from the usurious exaction."

27. In the same State, a bond and mortgage were given for $10,000. The mortgagees pressed a foreclosure, and had obtained a decree. The mortgagor procured from a third person an advance of $8,000, and himself paid the balance to the mortgagees. The bond, mortgage, and decree, were assigned by the mortgagees to the person advancing the money, who afterwards pressed a sale under the decree for the whole $10,000 and interest. Upon an order on him in favor of an assignee of the mortgagor, to show cause why an injunction should not issue, and the sale be stayed; the order was made absolute for an injunction, unless the defendant would stipulate to accept the $8,000 with interest; upon non-payment of which the sale should proceed.[1]

28. In North Carolina, a mortgagor who has not paid the amount of the loan admitted to be due, nor brought it into court, cannot enjoin the mortgagee from collecting the debt or bringing ejectment for the land, although the mortgagor alleges that the contract was usurious. Thus the plaintiff borrowed from the defendant $1,000, for which he was to pay 10 per cent. annually, by way of interest, and, to cover the usury, the title to certain lands, which the plaintiff had bought, but not paid for, was conveyed to the defendant; and the parties entered into a covenant, that the plaintiff should lease the land, from year to year, so long as he saw proper, at the annual rent of $100, and was to have the fee-simple, whenever he paid the $1,000, together with the rent. The plaintiff paid the agreed sum for several years, when he failed to pay, and the defendant brought a suit, and recovered judgment for $233 rent; and also an action of ejectment, in which he recovered judgment; and was about to sue out execution upon both judgments. The plaintiff brings a bill in equity for an account, and a conveyance in fee upon payment of $1,000, and 6 per cent. interest, deducting the sums already paid; and for an injunction against both said execu-

[1] Pearsall *v.* Kingsland, 3 Edw. 195.

tions. Held, as the plaintiff was in arrear some six or seven hundred dollars, after allowing all credits, the bill could not be maintained.[1]

29. In Vermont, payments made on a usurious contract, to an amount within that of the debt and legal interest, will be treated in equity as payments generally, and, in the case of a bill to foreclose a mortgage, may be insisted on by way of answer.[2]

30. In Maryland, where a party goes into a court of equity to ask relief against a usurious mortgage or contract, he must do equity by paying or offering to pay the principal sum with legal interest.[3] And where the creditor is compelled by the Court to file his mortgage before it is due, and placed in his present position by *act of law*, he cannot be regarded as the actor; but the subsequent mortgagees, who interpose the plea of usury, and demand relief against him on this ground, are the actors, and their case is fully within the spirit, if not the letter, of the rule, that requires equity first from them.[4]

31. In Kentucky, it is competent for a mortgagor, of whom usury has been exacted, to waive it, in whole or in part.[5] In the same State, where a conveyance was made to secure a usurious loan; the grantor, at his election, to repay at a certain time; otherwise, the grantee to have his election to purchase: held, for want of mutuality, the grantee could not enforce this contract in equity, but the grantor might redeem on repaying the loan with interest; otherwise, a sale to be decreed.[6]

32. In Georgia, a mortgagor may have relief in equity from a usurious contract, although he might dispute the amount due at common law, and though the bond and mortgage have been assigned. If the bill alleges that the assignee had notice of the usury, and that the assignment was merely colorable, the Court will grant an injunction to stay

[1] Cunningham *v.* Davis, 7 Ired. Eq. 5.
[2] Ward *v.* Sharp, 15 Verm. 115.
[3] Wilson *v.* Hardesty, 1 Md. Ch. Decis. 66.
[4] Carter *v.* Dennison, 7 Gill, 157.
[5] Fenwick *v.* Ratcliffe, 6 Monr. 154.
[6] Butt *v.* Boudurant, 7 Monr. 421.

proceedings on the execution issued by virtue of the foreclosure of the mortgage, where the allegation of usury is not refuted.[1]

33. With regard to the *parties* whose title may be impeached by usury in a mortgage; it has been held, that the lessee of an assignee of a mortgage, obtained on usurious consideration, without notice of the usury, is a *bonâ fide* purchaser, and not affected by such usury.[2]

34. In Jackson *v.* Henry,[3] it was held, that a *bonâ fide* purchaser, (*f*) under a sale made by a power of attorney contained in a mortgage, is not affected by usury in the mortgage debt; such decree being equivalent to a foreclosure and sale under a decree in equity. The statutory provision, that usurious securities shall be void, applies only between the original parties, where the suit is brought upon the security itself, and not to a new contract founded upon it, to which an innocent person is party. Kent, C. J., says:[4] — "The notice given by the advertisement is intended for the party as well as for the world, and he has an opportunity to apply to Chancery, if he wishes to arrest the sale on the ground of usury; and the statute likewise gives him his remedy by action. If he stands by and suffers the sale to go on, and an innocent party to purchase, unconscious of the latent defect, and without any means of knowing it, the purchaser has the preferable claim in equity to protection." (See § 39.)

35. But in Jackson *v.* Dominick,[5] which was an action of ejectment, brought upon a title derived from the mortgagor, subsequent to the mortgage, against the mortgagee, who had proceeded upon a statutory foreclosure, under the power contained in the mortgage, and obtained an absolute title; the plaintiff was permitted to go into evidence of the usuri-

[1] Winn *v.* Ham, Charl. (R. M.) 70.
[2] Jackson *v.* Bowen, 7 Cow. 13.
[3] 10 John. 195.
[4] Ibid. 196.
[5] 14 John. 435.

(*f*) In North Carolina, by statute, usury cannot be set up against a *bonâ fide* purchaser of land. N. C. St. 1842, 1843, 107.

ous consideration of the mortgage, (although objected to,) and, upon his proving usury to the satisfaction of the jury, judgment was rendered for the plaintiff. The Court say:[1] — "In the case of Jackson *v.* Henry it was decided, that a *bonâ fide* purchaser, without notice, under a sale duly made pursuant to the statute, by virtue of a power contained in a mortgage, is not affected by usury in the original debt. The Court there considered such a sale as equivalent to a foreclosure and sale under a decree of a court of equity, and that it could not be defeated, to the prejudice of a *bonâ fide* purchaser, on the ground of usury. That case was likened to the case of a contract originally usurious between the parties, and which has been subsequently changed by a new contract founded on it, with a third person, who had no notice of the usury; in which case, such new contract could not be impeached for the usury which infected the original transaction; and also to the case of an innocent purchaser for a valuable consideration, whose title is valid, notwithstanding he may have bought from one who had obtained his title fraudulently. The general principle, that a derivative title is not better than that from which it is derived, is specifically recognized; but the fact, that Henry was a purchaser without notice of the usury, was considered as excepting such a purchase from the operation of that principle. Much stress, in that case, was justly laid upon the circumstance of the mortgagor's standing by, and permitting the sale to take place, and an innocent party to purchase. The purchaser here was a party to the corrupt agreement upon which the mortgage was given, and bought, with his eyes open, a disputed title. The mortgage here forms a part of the defendant's title; and he, being fully apprised that the mortgage was void in law, stands in no better situation than if no foreclosure had taken place. He is not in as good a situation as a *bonâ fide* assignee of an usurious mortgage, as to whom there is no question that the mortgage would be void. Whether a purchaser under a

[1] 14 John. 441, 442.

judgment, recovered upon a usurious debt, with notice of the usury, would acquire a valid title or not, is a point not now presented for decision. Most probably he would; but there is a palpable distinction between that case and this. When a cause of action has once passed *in rem judicatam*, the defendant and every other person is forever afterwards precluded from availing himself of any preëxisting matter, which might have been insisted upon in bar of the recovery. The original debt ceases to have a legal existence, being merged in the judgment; and the title of a purchaser under it is derived from the judgment, independent of the debt. But where the mortgage, and the power to sell, form the foundation of the purchaser's title; if these are void, so is the title derived under them, except in the case of an innocent purchaser. The defendant in this case is not a *bonâ fide* purchaser. A foreclosure of a mortgage under the statute is not founded upon any judgment. It is the mere act of the mortgagee, who cannot make that good and effectual, by a sale, which was unlawful and void in its inception."

36. Upon the question, what parties may avail themselves of the objection of usury in a mortgage, the cases seem not entirely reconcileable. The general rule is, that a stranger cannot set up the defence of usury. But it is otherwise with one claiming under and in privity with the mortgagor, in law or otherwise.[1] Thus a purchaser from the mortgagor,[2] or a second mortgagee. And it is held that, as against a second mortgagee, the mortgagee cannot apply payments made by the mortgagor to a portion of his debt which is usurious.[3] But a second mortgagee cannot set up usury in the first mortgage, unless in his bill to redeem he set forth such usury, with the facts and circumstances.[4]

37. A direct assignee, in trust, of the mortgagor, may impeach the mortgage for usury; more especially where he has not bought subject to the mortgage, and retained the amount

[1] Post *v.* Dart, 8 Paige, 640; Brolasky *v.* Miller, 1 Stockt. 807.
[2] Doub *v.* Barnes, 1 Md. Ch. 127.
[3] Green *v.* Tyler, 39 Penn. 361.
[4] Waterman *v.* Curtis, 26 Conn. 241.

of it in his hands, under an express or implied agreement to provide for it. Such an assignee stands in the place of the mortgagor, with the same rights which he had; and, like an assignee in bankruptcy, or an executor, or administrator, may question the validity of the debt outstanding against the estate.[1] (*g*) So A. made a deed to B. of a tract of land, receiving from B. a writing, stipulating, that A. should occupy the land for eighteen months, and, at the end of that time, B. should reconvey to A., upon receiving the money advanced to A. with usurious interest. B. being unable to pay, the contract was extended. C. took an assignment of the contract from A. in satisfaction of a judgment, and filed his bill, alleging usury, and that the transaction was a mere mortgage, and not a sale. Held, C. should be permitted to redeem.[2] So where the holder of a usurious bond and mortgage files a bill of foreclosure against the mortgagor, making a subsequent judgment creditor a party, in order that his decree may vacate the judgment lien, in the hands of the purchaser under such decree; the judgment creditor may rely upon the defence of usury to the full extent of his judgment lien, although the bill is taken *pro confesso* against the mortgagor.[3]

38. There is, however, another class of cases, which somewhat limit and qualify the right of other parties than the mortgagor himself to raise the objection of usury. Thus it is held, that, where a bill for foreclosure is brought against one who purchased the equity of redemption subject to

[1] Pearsall *v.* Kingsland, 3 Edw. 195.
[2] Skinner *v.* Miller, 5 Litt. 84.
[3] Post *v.* Dart, 8 Paige, 639. See Rexford *v.* Widger, 2 Comst. 131.

(*g*) In replevin against a sheriff, for goods taken on execution, by one claiming under a prior mortgage from the judgment debtor; the defendant may set up as a defence usury in such mortgage. Dix *v.* Van Wyck, 2 Hill, 522. So the grantee of lands, subject to an annuity or rent-charge, may set up the defence of usury in the deed from his grantor creating the rent-charge, the payment of which was attempted to be enforced by the summary remedy of distress under the deed. Lloyd *v.* Scott, 4 Pet. 205.

payment of the mortgage, he cannot set up usury in the mortgage as a defence, and thus obtain an interest in the property, which the mortgagor never agreed nor intended to transfer.[1] But in such case the plaintiff must set forth in his bill the execution and terms of the conveyance.[2] So the demandant in a real action counted generally on his own seisin and a disseisin by the tenant. The tenant set up a title derived from one Woods, who had mortgaged the premises to the demandant, and afterwards conveyed the equity of redemption to the tenant. The language of this conveyance was as follows: said Woods "demised, released, and quitclaimed to the said Kemp all the right in equity of redeeming, which he had in the premises." The deed did not mention the mortgage; nor in any manner specify the incumbrance alluded to; nor state how the right of redemption arose. But no other mortgage than that to the demandant was suggested at the trial. The tenant objected to the title of the demandant, upon the ground that the mortgage was made on a parol, usurious contract. Held, that evidence of such usury was inadmissible.[3] The Court say: — "Although by the statute of 1783, ch. 55, § 1, all mortgages on usurious considerations are declared to be utterly void; yet it never could have been intended that a stranger might enter on the mortgagee or commit a trespass on the land, and justify himself under the statute, when all parties interested in the title should be disposed to acquiesce in the contract. The statute must have a reasonable construction, and in conformity to its general object; which was to protect debtors from the enforcement of unconscionable demands. A mortgage on a usurious consideration is therefore void only as against the mortgagor, and those who may lawfully hold the estate under him. On this construction, if the tenant had purchased the land, he might avoid a previous usurious mort-

[1] Morris *v.* Floyd, 5 Barb. 130; Brooks *v.* Avery, 4 Comst. 225; Post *v.* Dart, 8 Paige, 640. See Gordon *v.* Hobart, 2 Sumn. 402.

[2] Hetfield *v.* Newton, 3 Sandf. Ch. 564.

[3] Green *v.* Kemp, 13 Mass. 515–518.

gage, although he had notice of such mortgage before the purchase. But the tenant has no title in the land before redeeming. He has purchased only the right to redeem; and if he will not avail himself of this right, which is the basis of his title, he cannot hold the land; and having no title in the land, he cannot be permitted to avoid the mortgage by plea or proof of usury. The principle contended for by the tenant's counsel would serve to encourage fraud and injustice, rather than to restrain the taking of excessive usury." So it is held that this defence cannot be set up by a subsequent mortgagee; more especially by one who has foreclosed his mortgage and himself become the purchaser, and sold the estate subject to the first incumbrance.[1] Or, if a subsequent mortgagee can set up this objection, that he must allege it in his bill.[2] Thus, where a mortgagor pays usurious annual interest, which is received and accounted for as interest; in a bill for foreclosure, a subsequent mortgagee, made party defendant, cannot claim to have the excess of interest deducted from the amount to be paid in redemption of the first mortgage.[3] So, in a real action, the tenant alleged that the demandants' title was by mortgage, and pleaded usury paid to a prior holder of the mortgage; averring that the note came to the demandants discredited. The demandants, in their replication, denied that the note came to them discredited; set forth several assignments; the foreclosure of the mortgage, and a conveyance of the premises to themselves; alleged that they took without notice of usurious transactions, (tendering their own oath,) and that the usury, if paid at all, was paid to one A., a former holder of the note and mortgage, after he had assigned the same. They also tendered the oath of A., to prove that the amount of usury taken was less than that alleged. Held, this plea was bad; that the tenant should first allege that the demandant's title is by mortgage only, and then plead usury; and in case of such an allegation and plea, the plaintiff may, 1, file

[1] Morris *v.* Floyd, 5 Barb. 130; Mechanics', &c. *v.* Edwards, 1 Barb. 271.

[2] Baldwin *v.* Norton, 2 Conn. 161.

[3] Churchill *v.* Cole, 32 Verm. 93.

a counter allegation; 2, make an objection, which would be sufficient, if the action were upon the note; 3, reply that a smaller sum only was taken as usury, and offer to verify by oath; 4, reply that the mortgage is foreclosed. If the demandant reply a foreclosure, and fail in sustaining his replication, he admits the usury, and such judgment will be rendered for the tenant as his plea entitles him to; unless the demandant obtain leave to reply to the plea of usury.[1]

39. But the law will always afford to the mortgagor an opportunity to avail himself of the defence of usury, unless he is guilty of some *laches*. Thus, an equity of redemption having been sold on execution, and the purchaser having become absolute owner by the lapse of a year, he took an assignment of the mortgage and thus acquired the whole estate; but the mortgagor always remained in possession. In a writ of entry by the purchaser against the mortgagor; held, the latter might set up, as a defence, usury in the mortgage notes; this being the first opportunity afforded him to avail himself of such defence, and the right not having been waived or forfeited by any neglect.[2] So it is held that a statutory foreclosure of a usurious mortgage, and a sale of the mortgaged premises, followed by a sale thereof to a third person for a valuable consideration, without notice of the usury, will not convey a valid title to the land, or estop the mortgagor from alleging usury in the mortgage.[3] (See § 34.)

40. If judgment has been recovered upon a usurious contract secured by mortgage, and a new mortgage given, the mortgagor cannot resist a suit on the latter, upon the ground of usury. The judgment upon the contract which was affected by usury having concluded the debtor from showing it in an action upon the judgment; he is equally concluded in a suit on the mortgage.[4] So where an execution is levied upon a mortgaged estate, and the incumbrance estimated by appraisers; upon a petition to redeem, the creditor cannot set

[1] Briggs *v.* Sholes, 15 N. H. 52.
[2] Richardson *v.* Field, 6 Greenl. 35.
[3] Hyland *v.* Stafford, 10 Barb. 558.
[4] Thatcher *v.* Gammon, 12 Mass. 268.

up usury in the mortgage.[1] So, where a mortgagee sues upon his mortgage, and the mortgagor defends upon the ground of usury, but fails in such defence, and afterwards conveys his right in the land; the purchaser cannot maintain ejectment against the mortgagee upon this ground, being estopped by the former judgment.[2] So, where mortgage notes are usurious, the mortgagor must set up this defence to a bill for foreclosure, or he will be barred by the decree. But if the original contract, proved by the notes, was not usurious, a subsequent payment of usury has no connection with it, and may be recovered back as money had and received, even after a decree for foreclosure, without deduction of such usury.[3] So, after a default has been regularly entered in a foreclosure suit, it will not be opened for the purpose of enabling the defendant to set up as a defence, that the mortgage was given in violation of the restraining law, except upon the terms of paying the moneys or property actually received from the mortgagee.[4] So a judgment creditor, acquiring a lien upon the mortgagor's whole interest in premises subject to a usurious mortgage, may obtain a perfect title by sale and purchase under the judgment; and may then enjoy the property as fully as the mortgagor would have done had he continued to be the owner.[5] (*h*)

41. In New Hampshire, in a writ of entry upon a mortgage, the defendant may reduce the amount of the conditional judgment by a deduction of three times the amount of the excessive interest. The plea may be with a general verification, as at common law, or with a special verification

[1] Waterman *v.* Curtis, 26 Conn. 241.
[2] Adams *v.* Barnes, 17 Mass. 365.
[3] Grow *v.* Albee, 19 Verm. 540.
[4] Bard *v.* Fort, 3 Barb. Ch. 632.
[5] Post *v.* Dart, 8 Paige, 640.

(*h*) Where a mortgage is made to secure a claim which is void by statute, and a subsequent mortgage to another person for a lawful debt, and the former claim is satisfied by a sale or a discharge of the first mortgage; the second mortgagee cannot recover the amount from the first mortgagee. Ellsworth *v.* Mitchell, 31 Maine, 247.

under the statute, tendering the defendant's oath. It is a good replication, that the same defence was set up unsuccessfully to a suit upon the mortgage note; but not without an express averment of a judgment in such suit.[1] (See § 24.)

42. In Connecticut, in an action of ejectment, the defendant may prove usury, in order to invalidate the plaintiff's title, founded on mortgage, without having given notice.[2]

43. To a bill of foreclosure, the defence of usury must be set up by way of plea, and, if insisted upon in the answer, it must be proved not by the answer, but by evidence *aliunde*.[3]

44. It has been held, that parol evidence is admissible to prove a deed absolute in form to be in reality a usurious mortgage.[4] But in the case of Flint *v.* Sheldon,[5] the demandant, to prove his seisin, produced an absolute deed from the tenant to him. The defence was, that the deed was made upon a usurious contract; and the tenant offered to prove by parol evidence, that the conveyance was not, as it purported to be, an absolute one, nor the contract upon which it was made a purchase and sale of land, but an agreement for the loan and repayment of money, the deed to be void, or the premises reconveyed, upon such repayment. Held, such evidence was inadmissible. The Court say,[6] after remarking that independently of the rate of interest, it would be clearly incompetent to control an absolute deed by evidence of a parol agreement: — "The question then is, whether the rate of interest, at which the money is supposed to have been lent, makes any difference in such a case. The parol evidence would tend to explain or vary the import and effect of the deed, as much if the loan were proved to be at the rate of seven per cent., as if it were at the rate of six. The statute of usury has not rescinded, nor in any manner modified the rules of evidence before mentioned. The intention of the

[1] Divoll *v.* Atwood, 41 N. H. 443.
[2] Holton *v.* Button, 4 Conn. 436.
[3] Dyer *v.* Lincoln, 11 Verm. 300; Briggs *v.* Sholes, 14 N. H. 262.
[4] Stapp *v.* Phelps, 7 Dana, 300; Cook *v.* Colyer, 2 B. Mon. 72.
[5] 13 Mass. 443. See ch. 3, § 14.
[6] Ibid. 447.

legislature was to render void every usurious contract; but they have left it to be ascertained, as in other cases, whether there is a contract for the loan and repayment of money, before the provisions of the statute can apply." They further remark,[1] as to the consequences of a different doctrine, "on proving usury in any conveyance within forty years by the demandant or his ancestor, he would recover the land against the grantee, or any assignee of his, however remote. For if the statute of usury applies to the contract, it renders it merely void. It would not, therefore, be enough, that a purchaser of land knew his own contract to be legal and valid; he must be certain that every successive sale of the land for forty years preceding had been likewise untainted with usury."

45. Where one purchased an equity of redemption, then took an assignment of the mortgage, and immediately mortgaged to the original mortgagee; held, in a writ of entry brought by the assignee against the mortgagor, the declarations of the original mortgagee could not be given in evidence, to prove usury in the first mortgage.[2]

[1] 13 Mass. 450.

[2] Richardson *v.* Field, 6 Greenl. 303.

CHAPTER XX.

VOID AND VOIDABLE MORTGAGES. ILLEGALITY, WANT, OR FAILURE OF CONSIDERATION.

1. Illegal consideration.
5. Want of consideration; as between the parties, and in relation to creditors, &c.
12. Want or failure of consideration, consisting in *a defect of title.*

1. In reference to the *consideration* of a mortgage, objection may be made to the mortgage, upon the ground either of *illegality*, or of an entire *absence*, of consideration.

2. Illegality of consideration undoubtedly, in general, avoids a mortgage, as well as an executory contract; whether such illegality consist in violation of the common law or of a positive statute.

3. But it is held that a mortgagor may redeem, although the mortgage was given to secure notes, founded on a consideration which was illegal or in violation of public policy.[1]

4. A mortgage, given to secure payment of a certain sum to the county, as the condition of a pardon, is held not void for *duress*.[2] But a mortgage taken to secure a debt, but on the consideration, that the mortgagee would use his efforts to obtain a *nolle prosequi* to an indictment pending against the mortgagors, is against public policy and void.[3]

5. The further question has arisen, whether a mortgage could be avoided for *want* of consideration. A mortgage of real estate is *a sealed instrument*, and in general the existence of a consideration of such an instrument is not open to dispute. Thus it is held, that a mortgagor is estopped from saying that no title was conveyed to the mortgagee.[4] The

[1] Cowles *v.* Raguet, 14 Ohio, 38.
[2] Rood *v.* Winslow, 2 Doug. 68.
[3] Wildey *v.* Collier, 7 Md. 273.
[4] Bailey *v.* Lincoln Academy, 12 Mis. 174. See Brock *v.* Lewis, 7 Rich. Eq. 77.

peculiar nature of a mortgage, however, as a mere incident to the personal obligation which it is made to secure, has, in this as in other respects, given to it a different legal effect from that of other instruments, which are in form similar.[1] (*a*)

6. In reference to the *sufficiency* of a consideration; where

[1] See Pratt *v.* Law, 9 Cranch, 456; Doniphan *v.* Panton, 19 Mis. 288.

(*a*) In some instances, the general principle upon the subject of consideration is enforced by express statutory provision. Thus, in Massachusetts, all mortgages, in which the whole or any part of the consideration shall be for money or goods won by gaming, or by betting on the sides or hands of any persons gaming, or for repaying money knowingly lent or advanced for gaming or betting, or at the time and place thereof to any person gaming or betting, are void between the parties, and as to all but ignorant, *bonâ fide* purchasers; and, when declared void, the lands pass to the then heirs of the mortgagor. Mass. Rev. Sts. 387. Similar statutes exist in other States.

A mortgage informal by statute may be good at common law. Haffley *v.* Maier, 13 Cal. 13. A party received, as the consideration of a mortgage to an insurance company, policies of the company to the amount of the mortgage. Afterwards, by agreement with the president of the company, he gave back a part of the policies for the mortgagor's own note and that of another party. Held, that this disposition of part of the policies did not render the transaction a *bonâ fide* one. General Ins. Co. *v.* United States Ins. Co. 10 Md. 517.

In Georgia, in a proceeding to foreclose a mortgage, the mortgagor, at the return term, may show cause against the rule *nisi*, from what appears on the face of the papers, or by pleading and proving that the mortgage-note is usurious, or founded upon a gaming consideration, or that it was given to compound a felony, or was coerced by duress, or that the mortgage has been released, or by any other meritorious defence; and the mortgagee, before the rule will be made absolute, must show that he is entitled to foreclose, and what is due on the mortgage. Dixon *v.* Cuyler, 27 Geo. 248.

The illegality of the mortgage does not necessarily avoid the debt. It may be proved by parol evidence. Shaver *v.* Bear, &c., 10 Cal. 396.

One who enters upon public land under a previous possessor cannot avoid a mortgage executed by his predecessor, on the ground that the mortgage was not made according to the statute. Houseman *v.* Chase, 12 Cal. 290.

Uncertainty of description in a mortgage is no reason for refusing a foreclosure sale, though it may affect the title sold. Tryon *v.* Sutton, 13 Cal. 490; Whitney *v.* Buckman, Ibid. 536.

the plaintiff contracted to sell, and the defendant to buy, a tract of land, the deed to be received as soon as it could be conveniently executed, and a mortgage made for the price; and the mortgage was executed and left with the plaintiff's agent, and the plaintiff executed a deed, and sent it to his agent for delivery: held, in a suit on the mortgage, it was not invalid for want of consideration.[1] So forbearing to collect a debt for three months is sufficient consideration for a mortgage to secure the debt, if any consideration be necessary.[2] So a mortgage may be executed to secure a debt previously contracted; and by a partner and his wife, to secure the debt of the firm.[3] So the renewal of a note in consideration that it shall be secured by the mortgage of a third person constitutes a legal consideration for the mortgage.[4] (*b*) So where the grantee of land made a mortgage of it to a third person, which mortgage was afterwards disputed, on the ground of want of consideration both as to the grantee and mortgagee; and the consideration, as to the former, was the conveyance itself, and, as to the latter, the payment by him of debts due the grantor, and of other sums, at the request of a party interested in the land: held, in the absence of fraud, these considerations were sufficient, and the mortgage valid to the extent of the actual payments by the mortgagee; and that the fact, that the consideration stated in the mortgage far exceeded the amount of such payments, was only presumptive evidence of fraud, which might be rebut-

[1] Farmers', &c. *v.* Curtis, 3 Seld. 46.
[2] Bank, &c. *v.* Carpenter, Wright, 729.
[3] Cooley *v.* Hobart, 8 Clarke, (Iowa) 358.
[4] Magruder *v.* State Bank, 18 Ark. 9.

(*b*) When the price of property was paid in cash, with money borrowed by the purchaser, but at the same time the purchaser executed his note for the amount to the order of the vendor, and consented, in the act of sale, to a mortgage upon the property, in favor of the vendor, or any *bonâ fide* holder of the note; the transaction cannot be considered *simulated*, and the lender of the money, as holder of the note, will be protected in his right of mortgage. Cole *v.* Lovenskiold, 12 La. An. 16.

ted.[1] So, where A. gave his notes to three persons, for B.'s benefit, one for $1,500, and another for $3,500, and took from B. his note for $5,000, secured by mortgage; held, the transaction was a valid one.[2]

7. In the case of Wease *v.* Peirce,[3] it was held, that want of consideration, for the note secured by a mortgage, is a good defence to an action to foreclose such mortgage, brought by the administrator of the mortgagee, even though the note was made for the purpose of defrauding creditors. Shaw, C. J., in giving the opinion of the Court, suggested various considerations as the grounds of this decision. The object of such an action is chiefly to enforce payment of the debt, and for this reason the right of action is vested in the administrator, to whom the debt itself belongs. So also the judgment is conditional, and becomes vacated if the condition of payment within sixty days be complied with. Of course, therefore, the Court are bound to inquire how much is due, and, when it appears that there was no consideration for the note, there is nothing to found a conditional judgment upon, and the action cannot be sustained. Although an intention to defraud creditors might not of itself constitute a defence to the note, if a consideration were proved; yet such intention is no answer to the defence arising from want of consideration. In such case the maxim applies, *in pari delicto, potior est conditio defendentis.* So, in Abbe *v.* Newton,[4] a note and mortgage were made for inadequate consideration. Upon a bill for foreclosure against a purchaser from the mortgagor, making the latter a party; held, the plaintiff should have a decree only for the value of the property. So, a conditional pardon having required the criminal to secure $1,000 to the county, the county commissioners obtained a mortgage for $1,150. Held good for $1,000, but void for the rest.[5] And in the case of Mackey *v.* Brownfield,[6] which was *scire facias* upon a mortgage, it was held, that the mort-

[1] Parker *v.* Barker, 2 Met. 423.
[2] Bishop *v.* Warner, 19 Conn. 460.
[3] 24 Pick. 141.
[4] 19 Conn. 20.
[5] Rood *v.* Winslow, 2 Doug. (Mich.) 68.
[6] 13 S. & R. 239.

gagor might give in evidence admissions of the mortgagee, that the mortgage was made for more money than the mortgagor received.

8. Where land is defectively conveyed in satisfaction of a mortgage, and no title passes; a new mortgage may be made for this consideration, but the old mortgage cannot be revived without the mortgagor's consent and that of subsequent mortgagees.[1]

9. In New York, the Revised Statutes allow want of consideration to be set up as a defence against a sealed instrument. But where an executor brought an action for money had and received, and the defendant claimed to have received the money under a mortgage from the testator; held, the above provision did not apply to cases where the consideration comes in question *collaterally;* and that want of consideration for such mortgage could not be set up in defence to the action.[2]

10. Want of consideration may of course be set up in case of a mortgage, as of other deeds, to show *fraud against creditors.* Thus it is held erroneous to decree foreclosure of a mortgage, alleged to have been executed in fraud of creditors, where no consideration was advanced by the mortgagee.[3] Though, where the consideration of a mortgage was partly made up by an allowance of interest, the mortgage will not be considered as fraudulent against creditors, because such allowance was of a nature not recoverable at law.[4] So a mortgagee, claiming against a purchaser under a judgment creditor of the mortgagor, must prove the consideration of his mortgage.[5] So a person in failing circumstances, and about to mortgage his real estate and assign his personal property for the security of certain creditors, gave his own note for $800, and included it in the first mortgage and the assignment, on the sole consideration that the promisee should give his note for the same amount to the mortgagor, in order to furnish him with the

[1] Lasselle *v.* Barnett, 1 Blackf. 150.
[2] Gilleland *v.* Failing, 5 Denio, 308.
[3] Miller *v.* Marckle, 21 Ill. 152.
[4] Spencer *v.* Ayrault, 10 N. Y. (6 Seld.) 202.
[5] McGintry *v.* Reeves, 10 Ala. 137.

means of support for himself and his family, until he could resume business, and to enable him to make some provision for unsecured claims. The promisee accordingly gave his note, and paid thereupon $200, which the promisor applied exclusively to his own support. Held, the debt thus created was invalid against other creditors, and no part of it could be protected by the securities held by the promisee.[1] So a mortgage from son to father, mortgaged to secure payment of a certain sum advanced in lands, *since mortgaged*, imports that the lands were given as an advancement, and is invalid as against creditors of the mortgagor.[2] (*c*)

11. But on the other hand, where the plaintiff avers that he is a creditor of one of the defendants, and that the latter had executed a mortgage in favor of the other defendant, without consideration, and for the fraudulent purpose of defeating the plaintiff's recourse upon the property, and prays that the mortgage may be cancelled, and the property subjected to his claims; the plaintiff must prove himself a creditor, even though judgment was rendered by default.[3]

12. In cases of a conveyance of land, and a mortgage back for the price, the question has often been raised, whether *want* or *failure* of consideration, consisting in a defect of title on the part of the mortgagee or grantor, can be set up as a defence to a suit upon the mortgage.[4] (*d*) In

[1] Pettibone *v.* Stevens, 15 Conn. 19.
[2] Waller *v.* Todd, 3 Dana, 503.
[3] Fink *v.* Martin, 1 La. Ann. R. 117.
[4] See Napier *v.* Elam, 6 Yerg. 108; Forster *v.* Gillam, 1 Harr. 340.

(*c*) Two foreclosure suits were consolidated by consent, and the second bill agreed to be taken as an answer and cross-bill to the first; the first complainant admitting the validity of the second mortgage, while the second alleged, that the first mortgage was intended to hinder and delay creditors, and that the debts secured by it were fictitious. Held, the first complainant, as against the second, must prove the existence and *bona fides* of this debt. De Vendal *v.* Malone, 25 Ala. 272.

(*d*) A vendee may deduct, from the amount of his purchase-money, the value of an easement in favor of another estate, to which the land sold is servient, existing at the time of his conveyance, and of which the vendee at that time had no notice. Stehley *v.* Irvin, 8 Barr, 500.

Van Waggoner *v.* M'Ewen,[1] a defence to a bill for foreclosure was denied, because the party merely alleged an outstanding title. So in Van Riper *v.* Williams,[2] to a bill for foreclosure, the defendant answered, that the mortgage was given for the price of land, conveyed with covenant of seisin and against incumbrances, except a specified mortgage, but that the premises were subject to another mortgage "still outstanding, unsatisfied, and uncancelled." The case being submitted on the pleadings and proofs ; held, the mortgage must be removed, before a decree for foreclosure and sale could be made, or a sufficient portion of the proceeds of sale ordered to be applied to the mortgage, and deducted from the debt.

13. But the weight of authority is contrary to these decisions. Thus a conveyance was made with warranty, and a bond and mortgage back to secure part of the price. The mortgagor brings a bill in equity for an injunction of a suit at law, upon the ground of a failure of consideration of the bond and mortgage, consisting in a want of title in the mortgagee. It appeared, that the plaintiff in equity had taken possession and never been evicted ; that the securities had been assigned, for value ; and that the plaintiff, in consideration of forbearance, gave the assignee a new bond and mortgage, the latter having no notice of any fraud or failure of consideration in the original transaction. Held, the bill could not be maintained.[3] So a conveyance was made to the president of an incorporated company and his successors in trust for the stockholders. The president, under a power from the stockholders, conveyed and delivered possession to the defendant, having notice of his title, and took notes for the price, secured by mortgage of the property. In a bill to foreclose, brought by an assignee of one of the notes, the mortgagor sought to defend, upon the ground that the deed to the president was void, but did not allege any fraud or mis-

[1] 1 Green, Ch. 412. See Jaques *v.* Esler, 3 Ibid. 462.
[2] 1 Green, Ch. 407.
[3] Bumpus *v.* Platner, 1 Johns. Ch. 213 ; Davison *v.* De Freest, 3 Sandf. Ch. 456.

take. There had been no eviction from the premises. Held, no defence to a suit.[1] So the defence was made to a suit for foreclosure, that the mortgage was given to secure the price of the land, which was conveyed to the defendant without covenants, and that an adverse claimant had brought a suit for the land, which was vigorously prosecuted, and, if successful, would deprive him of all title except a right to dower; the defendant having been in possession since the purchase, and never evicted. Held, the plaintiff should have a decree for a sale, and for payment of any deficiency against the mortgagor.[2] So a mortgage was given in consideration of land purchased by the mortgagor, the title to a part of which failed, but without fraud on the part of the grantor. The mortgagor having entered, and the conveyance containing covenants of warranty; held, the facts furnished no defence to a bill for foreclosure, and that there should be a decree for a sale of the mortgaged premises, and an execution against the defendants for any *deficit* there might be after the sale. Bronson, J., says: "No one has brought any suit to question Varick's title, and, as far as we can know now, none will ever be brought. But should he ever be disturbed, he has an ample remedy on the covenants in the deed. More than that, he might have sued before this time, and may still sue when he pleases, on the covenant of seisin. If there was a serious question about the title, and a suit had actually been commenced to recover a portion of the land, Chancery might enjoin the respondents from proceeding at law to collect the whole amount of the mortgage debt, until the title had been tried;[3] and in such a case, where the proceedings to collect the mortgage debt are commenced in Chancery, that Court might perhaps stay the foreclosure suit, until there had been a trial at law. But it is no answer to say, peradventure the title may fail, and thus call on a court of equity to try, in this collateral man-

[1] Natchez *v.* Minor, 9 Sm. & M. 544.

[2] Banks *v.* Walker, 2 Sandf. Ch. 344.

[3] Johnson *v.* Gere, 2 Johns. Ch. 546.

ner, and without the proper parties, a question which properly belongs to a court of law. If the purchaser has not been ousted, he must pay the mortgage debt, and take his remedy on the covenants. The fact that there may now be a decree *in personam*, as to any balance which may remain after a sale under the mortgage, does not alter the principle."[1] So, in a bill to foreclose a mortgage, no question was made by the defendant, as to the complainant's right to a decree for a sale of the mortgaged premises, and payment of the debt and costs out of the proceeds, as far as the same would go. But the answer showed, that the defendant gave the bond and mortgage in part payment of the purchase-money for a number of lots, including those mortgaged; that the grantor had no title, and under the deed to him he had none, to four of the lots embraced in the deed and mortgage. But the answer was silent about the possession of the four lots; and whether it was or ever had been in the defendant; or whether the possession was held adversely under title paramount, or what that title was; resting on the broad assertion that "the deed, &c., had conveyed no right, title, or estate, or interest whatsoever, in or to the said four lots," and claiming, upon this ground, that the mortgagee should not have a decree over against the mortgagor for any deficiency, (according to the statutory provision in New York). Held, upon this answer, the Court was not bound to decree the defendant exonerated even *pro tanto* from the mortgage debt, but, in order to obtain such decree, the defendant should file a bill; but further, that there was enough disclosed in the answer to warrant the Court in withholding the personal decree, and leaving the plaintiff to sue at law upon the bond, and also to file a bill for relief. Decree for foreclosure and sale, but with liberty to sue at law for any balance.[2] So A., being assignee of a mortgage for the purchase-money of a large tract of land, took a mortgage from B., the holder of a portion of the land, for his ratable pro-

[1] Edwards *v.* Bodine, 26 Wend. 109, 113, 114.

[2] Withers *v.* Morrell, 3 Edw. 560.

portion of the original mortgage debt, all the parties having notice of a claim of a paramount title in the State. The several holders of the land, covered by the original mortgage, subsequently petitioned the State for relief against the State claim, alleging that they had satisfied the original mortgage, and obtained a release from the State, at a price reduced on account of the alleged satisfaction of the mortgage. Held, B. could not afterwards resist the demand of payment of the substituted mortgage, especially as against a *bonâ fide* assignee of such mortgage.[1] So, in Platt *v.* Gilchrist,[2] a mortgage was given for the purchase-money of land conveyed with warranty. The answer to a bill for foreclosure alleged, that a suit had been brought by parties claiming the land under a paramount title, and prayed that the foreclosure and sale might be deferred till this suit should have been determined. Held, although after eviction relief would be granted, to prevent circuity of action, until such eviction the Court could not interfere. Mason, J., says: "The purchaser in this case promised to pay the purchase-money at stipulated periods, and the seller covenanted, that if at any time the title should fail, and the purchaser be evicted by a paramount title, he would refund the purchase-money with interest. The possibility that the title might fail, and the purchaser be evicted, was in the minds of the parties. They might also have provided, that in case of a claim being made by title paramount before actual payment of the consideration-money, the right of the vendor to call for its payment should be suspended. But this they have not thought proper to do, and this Court can with no more propriety add such a clause to the contract, and suspend the collection of the purchase-money, than it can suspend the collection of rent expressly covenanted to be paid, upon the destruction of the buildings, where the parties have not themselves provided against it."

14. More especially, where land is sold at auction, and

[1] Lee *v.* Porter, 5 Johns. Ch. 268.

[2] 8 N. Y. Leg. Observ. 7; acc. Mc Lemore *v.* Mabson, 20 Ala. 137.

conveyed without warranty, and at the risk of the purchaser, and a bond and mortgage given for the price, part failure of title is no defence to a suit for foreclosure, if there was no fraud or misrepresentation on the part of the mortgagee.[1] So, where a purchaser has notice of an outstanding claim of title, and takes a deed with general warranty, he cannot set up that title as a defence to an action on a mortgage for the purchase-money, when his possession has not been disturbed; though he was misled as to the nature of the adverse title by a statement of the vendor's agent.[2] And, in a suit for foreclosure, a defence of *undue influence* and *misapprehension of title*, was held insufficient.[3]

15. In one of the latest cases on this subject, where a mortgage was executed to secure two notes, given in part consideration for two tracts of land, and a complaint was made to foreclose, $600 being due; an answer, that as to one of the tracts, the grantors never had any title, and therefore the consideration as to that tract (alleged, by a species of *videlicet*, to be worth $3,000) had failed, was, on demurrer, held sufficient.[4]

16. And *actual eviction* is a good defence to a mortgage. Thus, in 1814, the plaintiff conveyed to the defendant, taking back a mortgage to secure the purchase-money. In 1824, a third person brought a suit for the land, of which the plaintiff had notice, and promised to defend, but judgment was rendered by default. In 1826, a writ of possession issued, of which the agent of the plaintiff had notice. In 1830, the defendant took a lease of the land from the plaintiff in the former suit, and continued to hold under him till 1845. In an action on the mortgage, held, the plaintiff must show title in himself, and that the defendant might set up a failure of consideration of the mortgage, notwithstanding his continuing in possession.[5]

[1] Banks *v.* Waller, 3 Barb. Ch. 438.
[2] Bradford *v.* Potts, 9 Barr, 37.
[3] Wooden *v.* Haviland, 18 Conn. 101.
[4] Conklin *v.* Bowman, 7 Ind. 533.
[5] Poyntnell *v.* Spencer, 6 Barr, 254.

CHAPTER XXI.

VOID AND VOIDABLE MORTGAGES. FRAUD BETWEEN THE PARTIES AND IN RELATION TO CREDITORS. FRAUD ON THE PART OF A MORTGAGEE; EFFECT UPON SUBSEQUENT INCUMBRANCERS.

1. Fraud between the parties.
6. Fraud as to creditors, &c.
16. Fraudulent concealment or misrepresentation of title by a mortgagee; effect upon subsequent incumbrances; attestation by him of a subsequent deed; delivery of title-deeds to the mortgagor, &c.; *estoppel.*
31. Limitations and restrictions of the rule above stated.
40. Mortgage from client to attorney.
41. Mortgage of an infant.
43. Mortgage in reference to bankrupt, &c., laws.

1. Fraud avoids mortgages, as well as other securities and transfers; and, as in other cases, may exist *between the parties*, or only *in reference to creditors.* (*a*)

2. Fraud in procuring a note and mortgage may be set up

(*a*) Where a statute prohibits loans from a corporation except to members; in an action to foreclose a mortgage made to the company to secure a bond, which recites that the defendant is a member, he is estopped to deny such recital, unless it be shown that the securities were given to evade the statute. Howard, &c. *v.* M'Intyre, 3 Allen, 571.

The same rules are applied to a mortgage as to an absolute deed, in reference to fraud against creditors. Webb's, &c. *v.* Roff, 9 Ohio St. 433.

In New Jersey, a mortgage made *after arrest of the mortgagor* is void. Rev. Stat. 324. See Cook *v.* Colyer, 2 B. Monr. 72; Wooden *v.* Haviland, 18 Conn. 101.

In Pennsylvania, where the signature of a recorded mortgage is alleged to be a forgery, the mortgagor, his representatives, or the owner of the premises, or any or either of them, may by petition to the Court of Common Pleas of the county where the mortgaged premises are situate, after suitable notice, and proof of the alleged forgery, have such mortgage cancelled on the record. Laws of Pa. 1862, p. 192.

In Wisconsin, in all suits to enforce notes, or to foreclose mortgages, given

against an assignee.[1] But equity will not relieve a mortgagor who has himself been accessory to a fraud.[2]

3. A bill in equity lies to set aside a fraudulent mortgage, though the plaintiff is in possession, and might maintain such possession against the mortgagee, at law.[3] Upon this subject Judge Story says:[4] "It is objected, that the bill asserts, that the title of the defendant being fraudulent is *ipso facto* void; and therefore his remedy is at law; and he has no standing in a court of equity. But a court of equity has a clear concurrent jurisdiction with courts of law in cases of fraud. Besides; here the bill goes for a discovery, and other equitable relief, which cannot be obtained by a suit at law. The plaintiff is in possession, and cannot sue at law. His only remedy is in equity. He seeks to remove out of his way a title, fraudulent in its nature, which obstructs his own title; and he seeks a declaration from the Court, that it is fraudulent, and that the fraudulent party shall execute a release." (*b*) And in a bill

[1] Marshall *v.* Billingsby, 7 Ind. 250.
[2] Wilson *v.* Watts, 9 Md. 336.
[3] Marston *v.* Brackett, 9 N. H. 337.
[4] Briggs *v.* French, 1 Sumn. 505, 506.

---

to secure the payment of notes, the maker may set up by plea or answer, that the note or mortgage was obtained by fraud or false representations. In case of mortgages, commonly called *farm mortgages*, to railroad or other incorporated companies, intended as the basis of credit, or in exchange for stock, all the written contracts between the company and the mortgagor connected with or referring to the making of the note or mortgage, and any fraudulent, false, or untrue statements relating to the pecuniary circumstances of such company, the route of the road or time of completion, shall be taken as part of the contract, run with the note and mortgage, and be obligatory on the contracting parties, and the assignees of the note and mortgage. Such assignee shall not be allowed to claim as an innocent purchaser without notice. Laws of Wisconsin, 1858, p. 46.

(*b*) For a similar ruling in regard to equity jurisdiction of a *usurious* mortgage, see Williams *v.* Ayrault, 31 Barb. 364. But in a late case the distinction is taken, that a *party* to a mortgage cannot set up a defence of this nature. The Court remark: "The position then is this, — that parties to a mortgage, made for the purpose of defrauding third persons, may, as between themselves, show the intended fraud, to make void the mortgage.

for discovery, and to set aside a mortgage, which the plaintiff alleges was taken by the defendant with intent to defraud the plaintiff, the defendant cannot, by demurring, avoid answering, and disclosing when the mortgage was made, or whether he claims to hold under it; or disclosing, and if in his power producing, the mortgage note; or stating when, where, in whose presence, and for what it was given, or from whom the consideration was received, and to whom paid.[1] So a bill in equity lies, to compel a fraudulent mortgagee to transfer the mortgage to the assignee in insolvency of the mortgagor; the equity of redemption having been sold on execution. In such case, the mortgage is be regarded as made in trust for the creditors of the mortgagor. It is void only as to the mortgagee, but valid as against the owner of the equity of redemption.[2]

4. But equity will not relieve a mortgagor who has himself been accessory to a fraud.[3] So fraud in procuring a mortgage is no defence to a bill for foreclosure, unless committed by the mortgagee or his agents, or with his knowledge at the time of taking the mortgage. The answer must distinctly state the facts which constitute the fraud, and charge the mortgagee with notice of it.[4] And under a statute, which provides that one claiming a title to real property, and in possession thereof, may file a bill in equity, for the purpose of compelling an adverse claimant to bring an action and try his right; the holder of a mortgage, duly recorded,

[1] Burns *v.* Hobbs, 29 Maine, 273.
[2] Bartholemew *v.* M'Kinstry, 2 Allen, 448.
[3] Wilson *v.* Watts, 9 Md. 336.
[4] Aikin *v.* Morris, 2 Barb. Ch. 140.

It is manifest that such a position cannot be maintained." Per Eastman, J. Blake *v.* Williams, 36 N. H. 42. Hence, where A. made two mortgages to B., the former of which was assigned to C., the latter to D.; and D. brings a bill in equity against the holders of the first mortgage and of the equity of redemption, to foreclose the latter, and obtain an account of the former: held, it could not be shown in defence, that D.'s mortgage was made to defraud third persons. Ibid. 40.

will not be ordered by the Court to bring an action for the purpose of trying his title, upon the petition of the assignee in insolvency of the mortgagor. The Court say: "The petitioners, if they deny the validity of the mortgage altogether, as one fraudulent against creditors, can bring a writ of entry themselves to try the title; and the defendants in their plea would be obliged to admit or deny the petitioners' title."[1]

5. The defence of fraud cannot be twice made to a claim under a mortgage. Thus, in ejectment brought by a mortgagee, the mortgagor set up the defence of false representations in obtaining the mortgage; but judgment was recovered against him, and the land sold on execution. Held, he could not make the same defence to a *scire facias*.[2]

6. Possession after the *law-day* raises no presumption of fraud against creditors.[3] So it is not a badge of fraud in a mortgage, that it was taken after the creditor knew of the debtor's intention to mortgage the same land to another creditor.[4] Nor is it sufficient proof of fraud, that a mortgage was made by a debtor, to two of his creditors, of property, against which he knew an attachment had been issued, but before a levy.[5] And in general it is held, that a debtor may give preference in a mortgage to one creditor over another, or designate the order in which the debts provided for shall be paid out of the property.[6] So the mortgagor cannot defend against an action for possession by the mortgagee, after breach, on the ground that the mortgage was made to defraud creditors; as, upon breach, the legal title is perfect in the mortgagee, and the other party cannot on such a ground annul an executed conveyance.[7] So, where a son, being indebted to his mother, executed to her a mortgage of all his property, which was no more than adequate security, at her

[1] Dewey *v.* Bulkley, 1 Gray, 416, 417.
[2] Lewis *v.* Menzel, 38 Penn. 222.
[3] Steele *v.* Adams, 21 Ala. 534.
[4] Craig *v.* Tappin, 2 Sandf. Ch. 78.
[5] Kennaird *v.* Adams, 11 B. Mon. 102.
[6] Robinson *v.* Collier, 11 B. Mon. 32; Solomon *v.* Sparks, 27 Geo. 385.
[7] Brookover *v.* Hurst, 1 Met. (Ky.) 665; 7 Wis. 263.

solicitation: held, the understanding of the parties, that the mortgage would not be enforced, did not avoid it as to creditors.[1] So, where a surety takes from his principal a mortgage to indemnify him, and joins with the principal in a bond for the prosecution of a writ of error, on a several judgment against the mortgagor, on the debt for which the mortgagee is surety; the validity of the mortgage will not thereby be affected.[2] And a mortgage *to secure the debt of another* is not *per se* fraudulent against creditors. Such mortgage is distinguishable from a voluntary conveyance or deed of gift, without consideration. In this case, the grantor finally parts with his property, and it is alienated as well from his creditors as himself. In the other it is a pledge only, perhaps for a small amount, and the grantor's estate is not devested. Moreover, a conveyance is not in law fraudulent, without a fraudulent intent in both parties. In a voluntary, absolute deed, both of course know the want of consideration; and from this a fraudulent intent must necessarily be inferred, if the grantor is at the time indebted. But a mortgage to secure the debt of another is not *voluntary*.[3]

7. But an oral promise by a mortgagee to creditors of the mortgagor, to relinquish his claim to the land, if they will take from the mortgagor another mortgage, and extend the time of payment, is presumptive evidence of fraud in the existing mortgage.[4] So a mortgage to a creditor of property to an unnecessary amount, and leaving nothing to satisfy a decree which was shortly expected to be rendered against the mortgagor; is fraudulent and void.[5]

8. Where one conveys absolutely, to protect the property from his creditors, with a private agreement reserving a title to himself; neither he nor his administrator can claim relief in equity.[6]

9. Where there was a fraudulent conveyance, with a mort-

[1] Maples *v.* Maples, Rice, Ch. 300.
[2] Stover *v.* Herrington, 7 Ala. 142.
[3] Marden *v.* Babcock, 2 Met. 99, 104, 105; Hearn, 1 Buck's Bankr. C. 165.
[4] Parker *v.* Barker, 2 Met. 423.
[5] Thompson *v.* Drake, 3 B. Mon. 565.
[6] Arnold *v.* Mattison, 3 Rich. Eq. 153.

gage back to secure the price, and the mortgagee assigned the notes and mortgage, and the mortgagor also transferred his title: held, the assignees of both parties succeeded to the rights of their assignors; that the purchaser of the equity of redemption might redeem, but could not, as a *creditor*, object to the title of the assignee of the mortgage.[1]

10. A mortgage, given by a fraudulent grantor to a judgment creditor, is good against him and all claiming under him. Also against a creditor, who has had the assignment set aside, but who had gained no lien prior to the mortgage.[2]

11. Where a mortgage is made to the mortgagee as trustee, who brings a bill for foreclosure; the mortgagor cannot set up as a defence the legal invalidity of the trust. The Court say: "He (the defendant) and those claiming under him can be in no danger of being made liable to pay the bond and mortgage or the purchase-money a second time, if they should now pay or suffer the property to be sold in payment and satisfaction of the lien upon it."[3]

12. In Connecticut, in the case of Palmer *v.* Mead,[4] contrary to the general doctrine, it was held, that, upon a bill for foreclosure, the *title* of the mortgagee cannot be inquired into. Hence, where attaching creditors of the mortgagor, after production of the note and mortgage, set up as a defence to such bill that the mortgage was fraudulent and void against creditors; it was held that such evidence was incompetent. The Court remarked, that, if the title to land *might* be brought in question, the process was local; whereas, by the established law, a bill for foreclosure need not be brought in the county where the land lies. In such bill it is sufficient to aver, that the defendant executed a deed on condition; and of course any circumstances showing the instrument to be *no deed*, such as forgery, want of witnesses, duress, fraud, coverture, &c., may be shown in defence; but not circumstances merely impairing *its effect*. (Two Justices dissented.)

[1] Sprague *v.* Graham, 29 Maine, 160.

[2] Fox *v.* Clark, Walk. Ch. 535.

[3] Schenck *v.* Ellingwood, 3 Edw. 175, 177.

[4] 7 Conn. 149.

13. Mortgage, to secure a note made without consideration, for the purpose of defrauding creditors, the mortgage being duly recorded. The mortgagee afterwards delivered up the note to be cancelled, and the mortgagor then conveyed to a *bonâ fide* purchaser. Subsequently, the mortgagee procured a new note, like the former one, and attempted to claim under the mortgage. Upon a bill in equity filed by the purchaser; held, he was entitled to a release of the mortgagee's pretended title; that the case did not fall within the principle, that a *bonâ fide* purchaser without notice cannot maintain a bill for relief, although he have a good equitable defence, the parties in this case not having equal equities; nor within the principle, that a subsequent purchaser with notice is not entitled to dispute a prior conveyance.[1] So, upon a bill to redeem brought by a subsequent against a prior mortgagee, it is held that, although the latter cannot defend, upon the ground that the second mortgage is fraudulent as against creditors, being neither a creditor himself, nor standing in such a relation as to defend in behalf of any creditor; yet, as showing the intention of certain acts, and in connection with an alleged want of delivery of the deed, the evidence is admissible.[2] And it is elsewhere decided, that a first mortgagee may take advantage of a fraud against creditors in a subsequent mortgage.[3] So a purchaser under a decree of sale, in a proceeding to foreclose the first mortgage, may impeach a subsequent mortgage, as fraudulent against creditors.[4]

14. Whether the consideration of a mortgage is *bonâ fide*, or merely colorable to defraud creditors, or so inadequate as to constitute a badge of fraud, is a question of fact which should be left to the jury, upon the whole evidence, without any restriction on the part of the Court, as to the necessity of proving all the items of indebtedness alleged.[5]

15. The declarations of a mortgagor, as to his intention

[1] Marston *v.* Brackett, 9 N. H. 337.
[2] Powers *v.* Russell, 13 Pick. 69.
[3] Shiveley *v.* Jones, 6 B. Mon. 274.
[4] Ibid.
[5] Williams *v.* Kelsey, 6 Geo. 365.

in executing the mortgage, are not admissible to impeach the title of the mortgagee, by showing fraud, unless they were brought to his knowledge prior to the execution of the mortgage.[1]

16. Another species of fraud, affecting the validity of a mortgage in reference to third persons, consists in misrepresentation or concealment, on the part of the mortgagee, with respect to his incumbrance, whereby a stranger is induced to purchase or make advances upon the land. Various maxims have been employed to express the rule of law upon this subject. "Qui tacet, consentire videtur. Qui potest et debet vetare, jubet." If a person maintains silence, when in conscience he ought to speak, equity will debar him from speaking when conscience requires him to be silent. It is a fraud to conceal a fraud. So, it is said, this rule rests rather on the tendency of such conduct to mislead, than on any deceit actually intended or actually practised in each case. So, also, that where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time; and that a party who negligently or culpably stands by, and allows another to contract on the faith and understanding of a fact which he can contradict, cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving. (*c*)

[1] Prior *v.* White, 12 Ill. 261.

(*c*) Upon the principle stated in the text, a mortgagee, without notice of an outstanding equitable title, in one who encourages him to take the mortgage, or stands by and makes no objection, will be protected against it. Green *v.* Price, 1 Munf. 449.

Upon a similar principle, the discharge of a mortgage, accompanied by a representation that it was paid, is sometimes construed as an assignment. Wilson *v.* Kimball, 7 Fost. 300.

17. It is held to be no answer to this objection, that the incumbrance was concealed from *prudential* motives, or a mistaken sense of duty to the party's employer. Nor that the misrepresentation occurred through ignorance or inattention, if an innocent purchaser was thereby prejudiced.[1]

18. Frauds of this nature constitute a frequent subject of equity jurisdiction. And a court of chancery, in such case, will not only refuse its aid to enforce the mortgage, but, upon a bill by the party injured to *quiet his title*, will decree a perpetual injunction against enforcing the mortgage, declare it void, or order a release or reconveyance.[2]

19. But, as will appear from some of the cases hereafter cited, courts of law have often recognized and acted upon the same principle.

20. Examples of estoppel, arising from actual misrepresentation, are where a claimant of land in a suit at law is shown to have stood by, knowing that another person was about to convey it, and declared that he had conveyed his interest to such person.[3] So A. sold land to B., B. to C., and C. to D. B. sued C. for the use of A., on a note given for the purchase-money, at the sale from B. to C., and made D. a party, praying for the enforcement of the vendor's lien. It was shown that A., after he sold the land, pointed it out to the sheriff as his property, and it was sold as such on an execution against him. The title acquired at this sale was afterwards conveyed to D. Held, the vendor's lien could not be enforced for the benefit of A.[4] So A. executed mortgage deeds of the same land, on the same day, to B. and C.; and C. afterwards assigned his interest to D. E., having attached the premises as the property of C., and recovered judgment against him, sent an agent to D., who had knowledge of such judgment, to inquire whether there was any priority in the

[1] Ibbotson *v.* Rhodes, 2 Vern. 554; Coote, 485; Otis *v.* Sill, 8 Barb. 102; Hall *v.* Fisher, 9 Ibid. 17; 1 Story, Equ. § 390; L'Amoreux *v.* Vandenburgh, 7 Paige, 321; Shepley *v.* Rangeley, 1 W. & Min. 217; per Ld. Denman, Pickard *v.* Sears, 6 Ad. & Ell. 474; Gregg *v.* Wells, 10 Ibid. 97, 98; Durham *v.* Alden, 2 Appl. 228.

[2] See 1 Hill. Real Prop. 452; Lawrence *v.* Delano, 3 Sandf. 333; Grace *v.* Mercer, 10 B. Mon. 157.

[3] Barnard *v.* Pope, 14 Mass. 437.

[4] McCown *v.* Jones, 14 Tex. 682.

deed under which he claimed; to which D. replied, "There was not;" that "both deeds were delivered at the same time;" and that "B. had given a writing to that effect." E. thereupon took a mortgage of the premises from C. to secure his debt; C. being, at this time, insolvent. D.'s representation, however, was not true; the deed to B. having been, in fact, delivered first. On a bill of foreclosure, brought by D. against E., it was held, that the plaintiff was precluded, by these facts, from claiming a priority of title.[1] So, where one having a mortgage upon the property of his son encouraged a third person to purchase the property, promising to abide by any agreement which the son might make concerning the mortgage; and the son delivered the mortgage to the purchaser, but it was redelivered to the father for the purpose of having it discharged: held, the mortgage could not be enforced.[2] So one co-tenant, owing one eighth of the land, and holding a mortgage on the other seven eighths, joined the other in a conveyance of the whole, the terms being as follows: — "Do hereby give, &c., that is to say, the said, &c., does hereby give, &c. seven eighth parts, and the said, &c. one eighth part of the following piece, &c. And we do covenant, &c. that we are lawfully seised, &c.; that they are free of incumbrances, and that we have good right to sell, &c. in the aforesaid proportions." The mortgagee did not disclose his mortgage to the purchaser. Held, an action could not be maintained upon the mortgage.[3] Shepley, J., says: — "Admitting the covenants to be several and not joint, the effect of this transaction is, that the demandant knowingly becomes a party to the most solemn assurance made by his mortgagor under his hand and seal, that the seven eighths 'are free of all incumbrances,' and that 'he has good right to sell and convey the same.' And he does this, while he held a mortgage covering the premises, on which was due more than double the amount of the purchase-money, without causing any exception of his own title

[1] Broome *v.* Beers, 6 Conn. 198.
[2] Curtiss *v.* Tripp, 1 Clark, 318.
[3] Durham *v.* Alden, 2 Appl. 228.

to be introduced. He is as much bound by the declarations of his mortgagor as if they were his own. It would be a fraud upon the purchaser to permit him now to disturb that title." So a mortgagee promised by a writing not under seal to extend the time of payment; and a third person in consequence bought the estate from the mortgagor. Held, the mortgagee was bound by his promise, and could not maintain *scire facias* upon the mortgage, until the time of such extension had expired.[1] Huston, J., says:[2] — "Whether such a paper given to the debtor would have been binding, is not the question, though if a mortgagee gives a writing to his mortgagor that he will accept a debt presently due, if paid in instalments at specified times, and receives one or more of them as they fall due, it may in some instances be a great fraud to afterwards proceed before the other instalments fall due; and I am not prepared to say that it would under all circumstances be void; but that is not this case. It is not fair nor honest to make a promise which induces a man, a stranger to the party, to pay his goods and give his labor to exchange his own property for an incumbered property, on a promise not to press the incumbrance, and then say, I make nothing by the indulgence which I promised you, and I will not meet my promise. True, the mortgage was a deed under seal, and this not under seal, but it was, though informal, enough to induce John to exchange for that land, and pay one third of a debt which he was not liable for, and never would have been, except for that paper. And in equity it was as binding as if more formally drawn, and under seal and witnessed." So A. bought a portion of land mortgaged to B., who agreed to release this part. B. foreclosed the mortgage, not making A. party to the suit, sold to C., who had notice, and released, as agreed, to A. A. had possession, made valuable improvements, and mortgaged to the plaintiff, who brings a suit for foreclosure, making A. and C. parties. Held, the plaintiff took a title, subject to a pro-

[1] Hoffman *v.* Lee, 3 Watts, 352.

[2] Ibid. 355, 356.

portional part of B.'s mortgage, and that he should have a decree for redemption and release as against C.[1]

21. But examples of mere inaction or concealment are equally numerous. As where a mortgage note is assigned without the mortgage, giving an equitable title to the assignee, but he conceals the assignment from a subsequent assignee of the mortgage.[2] So, if the mortgagee stands by at the sale by the mortgagor of part of the land, and receives the consideration; that part is discharged from the mortgage.[3] So in case of the levy of an execution upon the land.[4] (*d*) And consent may be implied, from the mortgagee's failure to disclose his title when informed of the proposed sale; long delay in claiming under the mortgage, until the death of the mortgagor; and permitting the sale of other property included in the mortgage.[5] So Lord Hardwicke granted a perpetual injunction against a mortgagee, who was casually present at a negotiation between the mortgagor and another, as to a marriage settlement on the marriage of their children, and concealed his mortgage from the father of the intended bride, but made a verbal promise to the mortgagor to rely upon his personal security only. And the Chancellor there refers to another case, where a perpetual injunction was granted

[1] Veach *v.* Schaup, 3 Clarke, (Iowa) 194.

[2] Anderson *v.* Baumgartner, 27 Mis. 80.

[3] M'Cormick *v.* Digby, 8 Blackf. 99.

[4] Grace *v.* Mercer, 10 B. Mon. 157; acc. Otis *v.* Sill, 8 Barb. 102. See Potts *v.* Arnow, 4 Halst. Ch. 322.

[5] Taylor *v.* Cole, 4 Munf. 351.

(*d*) But the rights of an absent mortgagee cannot be impaired by any notice given at an execution sale of the equity, as to the application of the proceeds to his debt. Byars *v.* Bancroft, 22 Geo. 34. A mortgagee is not estopped from purchasing the mortgaged premises sold at a sheriff's sale under a judgment prior to the mortgage, and acquires by such purchase an absolute title. Harrison *v.* Roberts, 6 Florida, 711. If a balance remains over the amount of the judgment, he has a right to discharge it to the extent of his mortgage, and the remainder in cash, which will be held by the sheriff, subject to claims of subsequent mortgagees in order of their priority. Ibid. It is held that the assignment of a mortgage estops the mortgagee and those claiming under him from setting up a title adverse to the mortgage. Rogers *v.* Cross, 3 Chand. 34.

against a mortgagee, who had engrossed a deed of settlement, without disclosing that he had a mortgage on the estate; and that, too, although the mortgagee was not of age at the time he engrossed the deed.[1] So a mortgagee requested the holder of a note of the mortgagor, in which the mortgagee was surety, to obtain judgment on the note, and levy on and sell the mortgaged premises; he was also present at the sale, and asked one person to bid, and did not object to the sale. Held, he was estopped to assert his title under the mortgage.[2] So an attorney, holding a mortgage upon land, was employed by the mortgagor to draw the deed and assist in the conveyance of a portion of the premises to an ignorant purchaser, and, although knowing that the purchaser was paying the full value of the property, concealed the fact of the mortgage. Held, neither the attorney, nor his assignee, could enforce the mortgage against this portion of the land.[3] So a mortgagee was told, that a person was drawing, or about to draw another mortgage on the same property, and on another occasion he stated to a party interested that he had examined the clerk's office, &c., and that he had frequent transactions with the mortgagor, whose embarrassments were notorious. Held, these facts were sufficient to affect him with notice, or at least to avoid any right of tacking subsequent advances to the mortgage debt.[4] So a devise of lands was made to children of the testator, with a provision that the part devised to one of them should be subject to the maintenance of his widow for life. The widow, claiming a beneficial interest in the lands devised, under a mortgage made to the testator and herself, deceptively acquiesced in the provisions of the will for several years, and thereby gave reason for confidence on the part of *bonâ fide* purchasers from the children that such provisions were to be final and not disturbed. Held, although such purchasers were

[1] Berrysford *v.* Millward, 1 Barn. Ch. 101.
[2] Morford *v.* Bliss, 12 B. Mon. 255.
[3] L'Amoreux *v.* Vandenburgh, 7 Paige, 316. See Atterbury *v.* Willis, 39 Eng. L. & Eq. 175.
[4] Averill *v.* Guthrie, 8 Dana, 82.

not proved, in fact, to have acted on this confidence, she was estopped to impeach their title.[1] So A., a widow, who, under her marriage settlement and otherwise, was entitled to annual and other sums charged on her husband's estates, was one of the trustees of his will, whereby the estates were devised in trust to raise £2,000, for her benefit, and subject thereto in trust to convey the estates as B., the testator's daughter by a former marriage, should direct. B. borrowed money upon a mortgage of some of the estates, in which A. and her co-trustee joined, and whereby, after reciting the will and the agreement for the loan, and that B. had directed A. and her co-trustee to make such conveyance as was thereinafter contained, A. and her co-trustee, as devisees in trust, by the direction of B., conveyed the estates to the mortgagee upon trusts for sale and for payment of the mortgage debt, and of the surplus as B. should appoint, and subject thereto according to the trusts of the will. Held, the mortgage did not pass the beneficial interest of A.; but her charges must be postponed to the mortgage, she having concurred in it, without reserving her priority.[2] So, in a real action,[3] the demandant gave in evidence a quitclaim deed from the tenant to Daniel Kimball, dated December 23, 1818; the levy of two executions on the 8th of November, 1827; a conveyance from the execution creditors to the demandant; a deed from Daniel to Leggett and Hance, dated November 27, 1828; and a deed from them to the demandant, dated April 25, 1832. The tenant then offered a bond from Daniel to him, dated December 23, 1818, conditioned to reconvey the property; a mortgage from the tenant to one Peabody, dated May 17, 1811, to secure a certain sum; an assignment of it by Peabody to Wheelwright and Clark, April 24, 1812; an assignment from them to one Buck, of June 2, 1827; and a deed from Buck, reciting a judgment on the mortgage and possession taken under it in 1824, to the tenant, dated June

[1] Ackla *v.* Ackla, 6 Barr, 228.
[2] Stronge *v.* Hawkes, 27 Eng. L. & Eq. 541.
[3] Hatch *v.* Kimball, 2 Shepl. 9.

2, 1827. The levies were duly recorded, as also all the deeds, all of which covered the demanded premises. The bond to reconvey was not recorded. The tenant had been in possession thirty years, built a house on the land, and made expensive repairs both before and after Buck's deed to him. Upon these facts, the defendant having been defaulted, the default was taken off, and a new trial ordered. Upon the new trial, a verdict was rendered for the demandant. It appeared, that, after the tenant had paid off the mortgage, and taken a release of the premises, having conveyed to Daniel and being still in possession, he knowingly suffered two executions to be levied on the premises as Daniel's without claiming title; that he pointed out the bounds at the time of the levy, and agreed to become a tenant and pay rent. He continued the tenancy till 1829, and rendered an account of repairs made by him to the plaintiff, who subsequently himself made repairs and put in another tenant. No claim was made under the mortgage, till after the plaintiff had purchased the title. Held, the mortgage, under these circumstances, was extinguished; that it could be kept alive only by the equitable principle of being most for the mortgagee's interest, which was rebutted by a stronger equity on the part of the demandant, and could not be applied where it would promote a fraudulent purpose.[1]

22. In the case of Mocatta *v.* Murgatroyd,[2] Lord Cowper decided, that a prior mortgage should be postponed to a subsequent one, merely on the proof that the prior mortgagee was a *witness* to the subsequent mortgage. This case was overruled by Lord Hardwicke in the case of Welford *v.* Beezely,[3] and by Lord Thurlow in Beckett *v.* Cordley,[4] so far as it charges a witness to a deed with knowledge of its contents merely from his attestation.[5] But in none of these cases was it doubted, that, if a mortgagee has actual knowledge of the contents of a subsequent mortgage, and nevertheless stands

[1] Hatch *v.* Kimball, 4 Shepl. 146.
[2] 1 P. Wms. 393.
[3] 1 Ves. sen. 6.
[4] 1 Bro. C. C. 357.
[5] Acc. Clabaugh *v.* Byerly, 7 Gill, 354.

by, and witnesses the execution of the second mortgage, without disclosing his prior incumbrance, this would be such a fraud in him, as would authorize a court of equity to postpone such prior incumbrance, so as to let in the subsequent mortgage.[1] But a first mortgagee's merely *drafting* a second mortgage will not postpone him, unless he denied and fraudulently concealed his title.[2] (*e*)

[1] See Brinkerhoff *v.* Lansing, 4 Johns. Ch. 65.
[2] Paine *v.* French, 4 Ham. 318.

(*e*) The following case in New Hampshire, though relating directly to the effect of this kind of fraud upon an *attachment*, involves also the rights of mortgagor and mortgagee, and is valuable for the general principles and the careful distinctions suggested by the Court.

The defendant, having notice that a part of the real estate of his debtor was mortgaged, apparently for its full value; and being informed by the plaintiff, another creditor, that he proposed to procure an arrangement by which such mortgage should be removed and another mortgage made to him; advised the plaintiff to complete the arrangement, as it would be good security for his debt. The agreement having been made, and the first mortgage discharged, before a new one was executed, the defendant laid an attachment upon the land. The plaintiff brings a bill in equity, praying that the defendant be enjoined from claiming under his attachment, contrary to the plaintiff's title under the mortgage. Held, he was entitled to such decree. Buswell *v.* Davis, 10 N. H. 413. (See Beall *v.* Barclay, 10 B. Mon. 261.) In giving the opinion of the Court, Parker, C. J., says (Ibid. 424, 425, 428): — "We are not required to give an opinion upon the question, whether a creditor can by means of an attachment avail himself of the benefit of a mere change of mortgages, in a case where he had no knowledge that such change was intended, but designed merely to avail himself of his right to attach the equity in (of) redemption. If in such case the change was to his prejudice, the mortgage substituted being of greater amount than that previously existing, he might well contend that his rights could not thus be affected by transactions to which he was no party, and of which he had no notice. Even if the new mortgage upon the land was of less amount than that previously existing; still, if he had no knowledge respecting the intention to make an exchange, and attached in good faith, he might perhaps well claim the benefit of the accidental advantage he had derived, and hold the land wholly discharged from incumbrance, because the prior mortgage was removed, and the new one executed subsequent to his attachment. We do not undertake to say that such would be the result. Nor is the case pre-

23. In reference to the question, whether *registration* of the prior mortgage constitutes such notice thereof, as to pre-

---

sented one where the attaching creditor has mere knowledge that a change of security is intended, and attaches with an intention of availing himself of the change, by interposing his attachment before the new mortgage, in case the parties to the contemplated change shall perfect it, without the caution of examining the records to ascertain whether any creditor has attached. That would be a much stronger case than the other; but whether the creditor might not in such case legally avail himself of the want of caution, asserting his right to attach, and take the chance of the removal of the existing incumbrance, so long as he in no way participated in advising to the change itself, is a question we may pass by at this time. The evidence carries the present case still further. Without going into the question, whether the testimony does not prove that the defendant advised to the arrangement with the very purpose of interposing an attachment, after the mortgage to Damon & Stickney was removed, and before that to the plaintiff was executed, it is sufficient that being consulted respecting the arrangement, he advised the plaintiff to effect it. If he desired to have any provision made in that arrangement for himself, he should have so stated explicitly. He cannot be permitted, after giving such advice, to avail himself of the exchange of the mortgages, and thereby obtain a security against the plaintiff, which he could not have had against Damon & Stickney. An attachment, with the purpose of obtaining a security prior to that of the plaintiff, under these circumstances, would not be a fair exercise of superior diligence, but would operate as a direct fraud upon the plaintiff."

In Massachusetts, the same question arose upon an alleged fraudulent attachment. The plaintiff, proposing to purchase land which was subject to a mortgage to the defendant, paid to the mortgagee the value of his interest in the land, and the mortgagee reconveyed to the mortgagor, to enable him to pass the entire title, four days afterwards, but immediately, and before execution of the deed, attached the land in a suit against the mortgagor, and subsequently levied an execution upon it. In an action of trespass for such levy, held, the attachment was fraudulent and void, and the plaintiff entitled to judgment, but, no actual damage to the land being proved, that he could recover only nominal damages. Spear *v.* Hubbard, 4 Pick. 143.

In June, 1782, the demanded premises were mortgaged for their full value to McFarland by Freeland. In January, 1792, the plaintiff attached the property in a suit against the mortgagor, subsequently recovered judgment, and extended an execution upon the estate. Four days after the attachment, the plaintiff was present and assisting at a negotiation between the mortgagee and mortgagor and one Goddard. The mortgage was can-

vent a subsequent incumbrancer from availing himself of any concealment or misrepresentation, in order to give priority to his own title; it is held, that, if a mortgagee represents to a creditor of the mortgagor, who has attached his goods, that the mortgage debt is paid or satisfied and nothing due thereon, and the creditor, by reason of such statement, relinquishes the attachment, and takes a mortgage of the land to secure his debt; the second mortgage, as between the two mortgagees, takes precedence of the first, though the first was on record at the time of such representation. The Court remark: — "Nor is it any objection, that the title of Platt was by a recorded deed. It is true, that title by mortgage-deed cannot be released by parol. But although the legal title might exist, as a paper-title, the party may not be able to enforce it or render it effectual. This species of defence, when offered to control written conveyances or title-deeds, is no more obnoxious to the objection of permitting oral evidence to control written, than exists in the ordinary cases of setting aside conveyances for fraud upon oral proof." [1] (*f*)

[1] Platt *v.* Squire, 12 Met. 494. But see Clabaugh *v.* Byerly, 7 Gill, 354. See also Napier *v.* Elam, 6 Yerg. 116.

---

celled, upon Goddard's paying part of the debt, and the mortgagor's giving a new mortgage of other lands, which were also attached by the plaintiff for the balance due him. The mortgagor then conveyed the demanded premises with other lands, in fee, to Goddard, under whom the defendant claims. The plaintiff was present, assisted in casting the sums due, and did not disclose his attachment; but he afterwards, before judgment, informed the mortgagee of it, and expressed his intention to levy his execution upon the lands last mortgaged, but, on the mortgagee's threatening to oppose him, and make known his privity to the transactions, he consented that the mortgagee should have the benefit of such mortgage. Judgment was rendered for the defendant upon a ground independent of the facts above stated. In regard to this part of the case, Parsons, C. J., remarks: — "Were we sitting as a Court of Chancery, with all the equitable powers of that Court, we ought to set aside the plaintiff's attachment on account of his fraudulent concealment of it. But as the justice of this case can be attained by the determination of the first question, it is not necessary to decide this point when sitting as a Court of Law." Foster *v.* Briggs, 3 Mass. 313.

(*f*) In the above case, the suit was a bill in equity to redeem, brought by

24. But on the other hand it is held, that a mortgagee, who has knowledge of a subsequent purchase, and has stood by and seen the purchaser making repairs and improvements, without speaking of the mortgage or making objections, may still set up the mortgage, if it was at the time on record, and if it does not appear that he knew the purchaser was ignorant of the mortgage, and that he was guilty of a fraudulent concealment.[1] So one who holds a mortgage duly recorded, more especially if he makes proclamation of the fact at a sheriff's sale subsequent to the date of the mortgage, may enforce his mortgage against the purchaser.[2] And in another case the Court remark : — " The incumbrance offered to be shown was a preëxisting mortgage, which must have been upon record, or it could not affect the defendant, unless he had notice at the time of the conveyance, in which case he could not now complain. If the deed were upon record, it would be constructive notice to defendant as well as plaintiff, and it does not appear either of them had notice in fact. And if the plaintiff had notice in fact of the incumbrance, which was upon record, and used no means to prevent the knowledge coming to the defendant, he would be guilty of no legal fraud in selling and deeding to defendant, without notifying him of the incumbrance." [3]

25. Various other applications have been made of the same general principle, as to the effect of misrepresentation

[1] Marston *v.* Brackett, 9 N. H. 337.
[2] Patterson *v.* Esterling, 27 Geo. 205.
[3] Per Redfield, J., Richardson *v.* Boright, 9 Verm. 372; 27 Geo. 205.

a second mortgagee against a first mortgagee, who also claimed under a third mortgage, which was made under the misrepresentation above referred to as to the second mortgage. The defendant set up an absolute title by entry and continued possession for the purpose of foreclosure, under the third mortgage; a tender having been made by the plaintiff only of the amount due on the first mortgage. Upon other grounds, the plaintiff was allowed to redeem a portion of the mortgaged estate, but as to the rest, the title under a foreclosure of the third mortgage appears to have been sustained.

or concealment upon the rights of parties interested in a mortgage. Thus, in the late case of West *v.* Jones,[1] one of two trustees paid over only a portion of the money, in consideration of which a mortgage was made to them; but the facts showing, that the other trustee had been misled into an advance of the money to his associate, in part by the conduct and declarations of the mortgagor, and the trustee who received the money having died insolvent, the mortgage was held to bind the mortgagor for the full sum expressed therein. The Court say:[2] — "The plaintiff relies on a principle perfectly familiar, not only to courts of equity but to courts of law, namely, that where a party has by words or by conduct made a representation to another, leading him to believe in the existence of a particular fact or state of facts, and that other person has acted on the faith of such representation, then the party who made the representation shall not afterwards be heard to say that the facts were not as he represented them to be. This doctrine is not confined to cases where the original representation was fraudulent. The doctrine not only of this court, but also of courts of law, goes much further. Even where a representation is made in the most entire good faith, if it be made in order to induce another to act upon it, or under circumstances in which the party making it may reasonably suppose it will be acted on, then *primâ facie*, the party making the representation is bound by it, as between himself and those whom he has thus misled."

26. If a second mortgagee stand by, and see the first induced by the mortgagor to release his mortgage and take an assignment of a subsequent security, supposing it to be the second; the second mortgage will be postponed.[3]

27. The rule in question applies to a subsequent mortgagee, where the title of the first mortgagee is originally defective, but is strengthened by a title acquired from a third person after the making of the second mortgage; the second

[1] 3 Eng. Rep. 223.
[2] Ibid. 227.
[3] Stafford *v.* Ballou, 17 Verm. 329.

mortgagee having notice of the first mortgage. Thus A. conveyed to B., in mortgage, land, the title to which was in the United States. C. afterwards obtained a patent to the land, and conveyed it to A., who afterwards mortgaged it to D., with notice of the prior mortgage to B. Held, that the conveyance by C. to A. enured to the benefit of B., and that D. took only as second mortgagee; and the rule was the same, whether D. had actual notice of the mortgage to B., or only constructive notice, by the registry of B.'s mortgage.[1]

28. Where a note was made by five joint trustees, and a mortgage of the joint trust property given to secure it, purporting to convey the whole estate, but signed by only four of the trustees, although drawn in the name of all, and it appeared, from the circumstances, that the other trustee must have known of the transaction, and that he never made any objection to it; held, the mortgage was binding upon him by an equitable estoppel, and the purchaser of the equity of redemption of the mortgagors at a sheriff's sale was also bound by it.[2]

29. The general principle above referred to has been applied, in England, to the case of a mortgagee's allowing the mortgagor to retain the title-deeds, and thus create a wrong impression as to his title. (See ch. 22.) Thus in Peter *v.* Russell,[3] it was held, that, if a mortgagee of a leasehold estate lends the original lease to the mortgagor, for the purpose of enabling him to take up more money, which is accordingly done, and a second mortgage made; the latter mortgage shall have priority of the former. So, in Farrow *v.* Rees,[4] Lord Langdale, M. R., says: — "The first objection made to the mortgage is, that no title-deeds were handed over to the mortgagee. The omission is not of itself sufficient to invalidate the mortgage; though a mortgagee may omit to take the title-deeds under such circumstances as to

[1] Warburton *v.* Mattox, 1 Morris, 367.

[2] State Bank *v.* Campbell, 2 Rich. Eq. 179.

[3] 2 Vern. 726. See Atterbury *v.* Willis, 39 Eng. Law & Eq. 175.

[4] 4 Beav. 21.

displace his priority in favor of a subsequent mortgagee." So, under an agreement to sell an estate, a part of the price to be paid on execution of the deed, the balance secured by mortgage, the sum agreed was paid, and the deed executed, but, with the title-deeds, retained by the seller. Without notice to the seller, the purchaser mortgaged to a third person, who did not investigate the title, or inquire as to the title-deeds, and afterwards to the seller as agreed. Held, the second mortgage should have priority of the first.[1] The Court say:[2] — "The title to chattels is evidenced by possession; but the title to land is evidenced by written instruments. Therefore it was the duty of Morgan, before he took his mortgage, to ask for the deeds; and, if he had asked for them, he would have learnt that they were in possession of persons who claimed a lien or charge upon the tenements, for unpaid purchase-money. And I think that he must be taken to have had notice of those circumstances, which, if he had not neglected his duty, would have come to his knowledge."

30. The rule above stated has been usually applied to a party falsely representing that an incumbrance was extinguished, when it was really still subsisting. In the following case, the application was reversed. One interested in an estate, which was charged with an annuity, was asked by a third person, who was about to loan money to the annuitant, whether the charge was still subsisting, and replied in the affirmative, when in fact it had been satisfied. Held, the loan was still a charge upon the land against the party's heirs.[3]

31. There is a class of cases, in which the general doctrine of equity above considered has been somewhat restricted, or construed more favorably to the rights of a prior mortgagee. In the case of Whitbread *v.* Jordan,[4] Alderson, B., says: — "When a party having knowledge of such facts as would

[1] Worthington *v.* Morgan, 16 Sim. 547.

[2] Ibid. 551.

[3] 1 Story on Eq. 210; Pearson *v.* Morgan, 2 Bro. 388.

[4] 1 Y. & Coll. 328. See Carpenter *v.* Cummings, 40 N. H. 158.

lead any honest man using ordinary caution, to make further inquiries, does not make, but, on the contrary, *studiously avoids making* such obvious inquiries, he must be taken to have notice of those facts which, if he had used such ordinary diligence, he would readily have ascertained." And where a mortgagee had notice of a previous lien upon the land before he took the mortgage, he cannot escape from its effect by having *forgotten* it at the time he took the mortgage.[1] So a subsequent mortgagee cannot avail himself of this objection to the prior mortgage, if he knew of its existence when his own was given, but has delayed to object on this ground. As where he thus delayed for nearly eighteen months.[2]

32. In the case of Jones *v.* Smith,[3] Wigram, V. C., goes into an extended notice of the decisions upon this subject, the result of which he states as follows: — "It is indeed scarcely possible to declare *à priori* what shall be deemed constructive notice, because, unquestionably, that which would not affect one man may be abundantly sufficient to affect another. But I believe I may, with sufficient accuracy for my present purpose, and without danger, assert that the cases in which constructive notice has been established, resolve themselves into two classes. First, cases in which the party charged has had actual notice that the property in dispute was in fact charged, incumbered, or in some way affected, and the Court has thereupon bound him with constructive notice of facts and instruments, to a knowledge of which he would have been led by an inquiry after the charge, incumbrance, or other circumstance affecting the property of which he had actual notice; and secondly, cases in which the Court has been satisfied from the evidence before it, that the party charged had designedly abstained from inquiry for the very purpose of avoiding notice." And in conformity with these views, where, before advancing money on a mortgage, the

[1] Hunt *v.* Clark, 6 Dana, 56.
[2] Clabaugh *v.* Byerly, 7 Gill, 354.
[3] 1 Hare, 55.

mortgagee inquired of the mortgagor and his wife, whether any settlement had been made upon their marriage, and was informed that a settlement had been made of the wife's fortune only, and that it did not include the husband's estate which was proposed as the security, and he afterwards advanced the mortgage-money without seeing the settlement or knowing its contents; held, the mortgagee was not affected with constructive notice of the contents of such settlement.[1]

33. It has been held that a mortgagee, whose mortgage is on record, upon being present at a sale of the equity of redemption on execution, is not called upon to give notice of his mortgage to the purchasers.[2] So a denial by a mortgagee that he has a mortgage, will not postpone his lien, unless he knows at the time, that he is inquired of with a view to a loan of money on the credit of the same estate.[3] So, it is said, where one who is "about to lend money on real estate, applies to one who holds a prior mortgage, to ascertain whether he has any incumbrance on it; there is no doubt, in such a case, that if the person making the application discloses that he is about lending money on the estate, he will be preferred to the first mortgagee, should the latter deny his having a mortgage, or assert that it is satisfied; and it seems agreeable to the dictates of reason and good conscience, that his claim should be postponed to that of a person whose confidence was inspired by the misrepresentation of one who was acting for himself, and every way competent to inform him of the truth. But in all the cases which have been decided on this principle, the fraud, for such it is supposed to be, has been practised by a party who has himself an interest in the subject-matter of inquiry, who cannot well be mistaken, and whose conduct therefore ought to be conclusive on him, when the rights of third persons come in question."[4] And it has been held in Maryland, that

[1] Jones *v.* Smith, 1 Hare, 43.
[2] James *v.* Morey, 2 Cow. 246.
[3] Chester *v.* Greer, 5 Humph. 26.
[4] Per Livingston, J., Lee *v.* Munroe, 7 Cranch, 368.

mere *silence* will not estop the prior mortgagee. There must be actual fraud, such as false representations, assurances of good title, or deceptive silence when information is asked. And the burden of proving such fraud lies on the subsequent mortgagee.[1] So the principle in question was held not to apply, because the mortgagee "did not anything against good conscience, whereby to forfeit his mortgage, he having neither actually encouraged the plaintiff to lend the money, nor passively, as standing by and concealing the mortgage, knowing that the plaintiff was about to lend money on the premises."[2] And where money is loaned to the mortgagor, on the faith of the declarations of the mortgagee, denying that he has a mortgage, but no security is taken on the property itself, the mortgage cannot be avoided for fraud in making the false declarations.[3]

34. If a mortgagee consents to the sale of the mortgaged premises *under an administration suit*, he may still claim priority in the distribution of the proceeds.[4] Wigram, Vice-Chancellor, says,[5] "That a mortgagee is entitled to his principal, interest, and costs, as against the mortgagor and puisne incumbrancers claiming under the mortgagor, cannot, as a general proposition, be disputed. But it was said that in this case the mortgagee, consenting to a sale, had thereby, to the extent at least of the costs of the sale, lost his priority, and that the expenses of the sale should, at all events, come out of the proceeds of the sale in the first instance. I am not of that opinion. The mortgagee consented that the estate should be sold free from incumbrances. How can such a consent have the effect of subjecting the security of the mortgagee to the costs of the sale. The consent of the mortgagee, that the mode of administering the equity of redemption shall be by a sale of the estate, free from incumbrances, is no waiver of his priority; although, where the sale is peculiarly for his benefit, it may possibly be otherwise."

[1] Clabaugh *v.* Byerly, 7 Gill, 354.
[2] Peter *v.* Russell, 2 Vern. 727.
[3] Chester *v.* Greer, 5 Humph. 26.
[4] Hepworth *v.* Heslop, 3 Hare, 485.
[5] Ibid. pp. 486, 487.

35. So although, where a mortgagee directed and sanctioned a sale of the property, without reference to the mortgage or the equity of redemption; received the proceeds; and did not object to or quash the sale; his conduct implies an admission of title in the mortgagor, and an abandonment of any title in himself inconsistent therewith, and bars him from setting up the mortgage in equity against the purchaser: yet it is not so where the lien is acquired by *attachment in chancery*.[1]

36. If a conveyance is made, with a covenant against all claims by the grantor or any one under him, and the grantee gives back a bond, to reconvey the premises to the grantor on demand, and the grantor afterwards becomes assignee of a mortgage previously made by him to a third person; he is not estopped from setting up his title under the mortgage against the grantee or those claiming under him.[2] The Court say,[3] "Taking both instruments together, Daniel (the grantee) was to take no beneficial interest. He could not avail himself of the covenant in the deed to him. He could neither enforce its performance, nor recover damages if it was not performed. It was completely neutralized and defeated by the condition in the bond. Stephen (the grantor) then is not estopped to claim the land; and he was at liberty to acquire for his own use any collateral title or assurance."

37. Where a conveyance of lands is made by a person not the proprietor, but assuming to be his agent, such proprietor does not ratify, or estop himself to deny, the sale, by taking notes and a mortgage back, the mortgage not referring specifically to the deed, or containing anything inconsistent with the agent's want of authority.[4]

38. Though the prior incumbrancer inaccurately states a particular sum as the amount of his charge; yet if such sum is also stated to be subject to an indefinite increase, so that the subsequent incumbrancer could not have relied upon

[1] Beall *v.* Barclay, 10 B. Mon. 261.
[2] Hatch *v.* Kimball, 2 Shepl. 9.
[3] Ibid. 13.
[4] Spofford *v.* Hobbs, 29 Maine, 148.

having any specific amount of security; he will be held to have had notice of the prior incumbrance.[1]

39. The doctrine of estoppel has been held not applicable to a feme-covert, who merely stands by, without objection, at a sale made by her husband.[2] (*g*)

40. Owing to the confidential relation between *an attorney and his client*, it has been held in some cases, that a mortgage from the latter to the former is invalid, upon the presumption of a want of consideration, or an unfair bargain. Thus it has been decided, that, where a party to a partition suit, pending the same, mortgages his interest to his solicitor, such

[1] Gibson *v.* Ingo, 6 Hare, 112. [2] Rangeley *v.* Spring, 8 Shepl. 130.

(*g*) The qualification of the principle of estoppel has been applied in favor of one claiming adversely to a mortgagee. Thus, one taking a mortgage, from an insolvent, of copyholds, without notice of the insolvency, cannot claim priority in equity to the assignees, on the ground, that by neglecting to take possession of the premises, or sell them, permitting the insolvent to retain possession, and omitting to make their entry on the Court rolls, as required by the insolvency acts, they have enabled the insolvent to commit a fraud upon the mortgagee, though nineteen years have elapsed since the insolvency. Cole *v.* Coles, 6 Hare, 517.

It is provided by statute in Georgia and South Carolina, that a mortgagor who mortgages anew, without disclosing in writing to the second mortgagee the existence of the first mortgage, shall not be allowed to redeem the second mortgage. But the second mortgagee (whose deed is on record, in Georgia,) may redeem the first mortgage. In South Carolina, if a person suffer a judgment or enter into a statute or recognizance binding his land, and afterwards mortgage it, without giving notice in writing of the prior incumbrance, unless within six months from a written demand he clear off such incumbrance, he shall not be allowed to redeem. Prince, 161; 1 Brev. 166–168. These statutes appear to be substantially reënactments of an act of parliament. Mr. Greenleaf says, (2 Greenl. Cruise, 126, n.) there are provisions similar to this (the concealment of a prior incumbrance by the mortgagor, St. 4 Wm. & Mary, ch. 16,) in South Carolina, Georgia, Tennessee, and North Carolina. But they are all originally of colonial enactment, probably either in the absence of any registration laws, or under the idea that registration was not notice to all the world. In the other States, the subject is left to be dealt with upon general law.

mortgage is not even *primâ facie* evidence of the debt for which it purports to be given. And the assignee of such mortgage, though for valuable consideration, and without notice of any equities between the mortgagor and mortgagee, will take it subject thereto.[1] But a mortgage from client to attorney for a just debt will not be set aside in equity.[2]

41. In connection with the general subject of void, &c. mortgages, it may be stated, that reference has been made in a former chapter (see ch. 1, § 20,) to the mortgages of *infants*, which, like most of their legal acts, are held to be *voidable*, not void, and therefore susceptible of confirmation upon their coming of age. And where an infant leases, and on coming of age mortgages to the lessee, referring in the mortgage to the lease; this is a confirmation of such lease.[3]

42. In Robbins *v.* Eaton,[4] one Harvey conveyed to the defendant, taking back a mortgage for the price. The notes and mortgage were assigned to the demandant, who brings a writ of entry for the premises. It appeared that the defendant was an infant at the time of making the mortgage, but after coming of age he occupied the premises, and offered to sell them. Held, if the purchase and mortgage back were one and the same transaction, the defendant's conduct after coming of age was an affirmance of the mortgage; otherwise, if the defendant purchased and paid for the land, so that the contract was complete and ended, and by a subsequent transaction mortgaged it. In the latter case, his remaining in possession and holding out against the mortgagee, instead of being an affirmance of the mortgage, would be an express denial of its validity, and a resistance of the attempt to enforce a claim under it; while, at the same time, such possession and claim of the land, after arriving of age, would be an affirmance of the original contract of purchase.

43. A mortgage, like other contracts and securities, may

[1] Ellis *v.* Messervie, 11 Paige, 467. See Atterbury *v.* Willis, 39 Eng. L. & Eq. 175; Mills *v.* Mills, 26 Conn. 213.

[2] Cheslyn *v.* Dalby, 2 Y. & Coll. (Exch.) 170.

[3] Story *v.* Johnson, 2 Y. & Coll. (Exch.) 586.

[4] 10 N. H. 561.

be void as repugnant to the provisions of *bankrupt or insolvent laws*.

44. A bond of defeasance, executed and recorded together with a deed of land made to secure a debt, was delivered by the grantor to another creditor, and the first creditor, on receiving, from the second, payment of his debt, conveyed the land to him, and the second creditor gave the debtor a new bond of defeasance conditioned for the payment of the amount of both debts. Held, that this transaction, although made to secure the debt of the second creditor in violation of the insolvent laws, gave him the right to hold the land against the debtor's assignee in insolvency, as security for the amount paid by him to the first creditor.[1]

Judd *v.* Flint, 4 Gray, 557.

CHAPTER XXII.

EQUITABLE MORTGAGE. — DEPOSIT OF TITLE-DEEDS.

1. Equitable liens.
2. Deposit of deeds; constitutes a mortgage; establishment of the doctrine; case of *Russel* v. *Russel*.
3. Qualifications and criticisms of the rule; remarks of judges and elementary writers.
4. Decisions, establishing the doctrine.
5. General rules and principles.
12. American doctrine.
17. Effect upon the title of a mortgagee, of leaving the deeds in the hands of the mortgagor, and a deposit by him.

1. In addition to the actual, conditional conveyance of land, which constitutes a legal mortgage; courts of equity have recognized certain other liens, arising from the implied agreement of parties, or the justice of the case, but not depending upon any express transfer of title. These are usually termed *equitable mortgages.* (*a*) One of these liens will be considered in the present chapter.

2. It is a doctrine of the Court of Chancery, in England, that a *deposit of the title-deeds* of an estate with a creditor of the owner constitutes a mortgage of the land, as against such owner, or any purchaser from him, having actual or implied notice; and that such mortgage may be enforced by a bill and decree for sale or foreclosure. The rule is said to have originated in 1783, and to have always met with strong

---

(*a*) In Florida, an equitable mortgage requires a specific agreement of the parties, and a valuable consideration. Cotten *v.* Blocker, 6 Flor. 1. In Massachusetts, the statute relating to foreclosure applies only to *legal* mortgages. Wyman *v.* Babcock, 2 Curt. 386.

An agreement by an insolvent debtor, to give a mortgage to preferred creditors, cannot be enforced against one holding a previous recorded mortgage, for the benefit of all the creditors under a subsequent assignment. Bloom *v.* Noggle, 4 Ohio, N. S. 45.

opposition from eminent judges; but to be now well established in the English law.[1] (*b*) It is, however, strictly con-

[1] See 4 Kent, 149, 150.

(*b*) The following case is said to be the earliest one in which the doctrine was definitely settled; and, as will be seen, though held a binding authority in subsequent cases, the principle of it has been often very seriously questioned.

In Russel *v.* Russel, 1 Bro. 238,* a lease was pledged, by one who afterwards became bankrupt, to the plaintiff, as security for a loan and other indebtedness. The pledgee brings a bill for a sale, claiming a lien on the estate, which was resisted by the assignee, on the ground that it would be charging the land without writing, contrary to the statute of frauds. Lord Loughborough: — "In this case, it is a delivery of the title to the plaintiff for a valuable consideration. The Court has nothing to do but to supply the legal formalities. In all these cases the contract is not to be performed, but is executed." Ashurst, Lord Commissioner: — "Where the contract is for a sale, and is admitted so to be, it is an equivocal act to be explained, whether the party was admitted as tenant or as purchaser. So here it is open to explanation, upon what terms the lease was delivered." An issue was directed, to try whether the lease was deposited as a security for the sum advanced; and the jury found that it was.

In Ex parte Haigh, 11 Ves. 403, 404, and note, Lord Eldon expressed his regret at the establishment of this rule; remarking that it had led to discussion upon the truth and probability of evidence which it was the very object of the statute of frauds entirely to exclude.

In Norris *v.* Wilkinson, 12 Ves. 197–199; (acc. Chapman *v.* Chapman, 3 Eng. Law & Eq. 70,) Sir William Grant remarked upon this subject substantially as follows. The mere fact that one man's title-deeds are found in another's possession, is not conclusive of any purpose to mortgage the estate. It may exist without any contract whatever. If the deposit is made when the money is advanced, the purpose must obviously be, to secure repayment, and there is little to be supplied by other evidence. The connection is not so direct, between a debt antecedently due and a subsequent deposit; nor is the inference so plain. And where the deeds are delivered,

* A note to this case says, that previously the point was much doubted. It was the first determination on the subject, and though confirmed (after the result of the inquiry, see 9 Ves. 117,) by Lord Thurlow, and often followed, has been uniformly disapproved of upon principle, for the most important reasons. It seems, from the cases, the Court will not allow the deposit to be a security for future advances, without the most distinct evidence of an agreement for the purpose.

strued, and will not be extended by any implication. Thus, it is held, that all the deeds must be actually and *bonâ fide* deposited with the mortgagee himself, and the principle, that equity will consider that as done which ought to be done, does not apply, unless the Court in which relief is sought has jurisdiction of the case, and authority to order that the act be done. A mere parol agreement to deposit deeds does not fall within this rule.[1] But, in a late case, a person, at

[1] 4 Kent, 149, 150; Clabaugh *v.* Byerly, 7 Gill, 354. See Price *v.* Bury, 27 Eng. Law & Eq. 178; James *v.* Rice, Ibid. 342.

---

not as a present security, but only for the purpose of enabling the attorney to draw a mortgage, which has been agreed for, the principle is wholly inapplicable. The deposit of deeds is indeed held to imply an obligation to execute a conveyance, whenever required. But in such case the primary intention is, to execute an immediate pledge; with an implied engagement to do whatever may be necessary to render the pledge effectual for its purpose. But in the case supposed, there was no intention to put the deeds into pledge. Nor does the death of the owner, before making the proposed mortgage, give any effect to the transaction as a deposit.

In Hooper, *ex parte*, 19 Ves. 477, a mortgagee for a term made further advances, and died. The mortgagor having become bankrupt, the executors of the mortgagee filed a petition, alleging an understanding and agreement, that the sum due for further advances should be tacked, and a further mortgage made therefor, and praying a sale. Lord Eldon said (Ibid. 478, 479): — "With great deference to Lord Thurlow, who first held that the deposit of a deed necessarily implied an agreement for a mortgage, I repeat, that this decision has produced considerable mischief; and that the case of Russel *v.* Russel ought not to have been decided as it was. There never was a case, where a man, having taken a mortgage by a legal conveyance, was afterwards permitted to hold that estate as further charged, not by a legal contract, but by inference from the possession of the deed. The other cases have gone far enough, indeed too far; and I will not add to their authority, where there are circumstances distinguishing the case before me."* The order was confined to the legal mortgage.

* In the same case Lord Eldon further remarked, that it was an error to suppose, that a deposit of deeds can refer to nothing but an intention to subject the estate. A deposit may be of considerable use, without any such object. The right to hold the deeds, and so to work out payment, is of great value.

In Whitbread's case, (19 Ves. 211,) Lord Eldon is reported to have said, that the decisions upon this subject amount to a *repeal* of the statute of frauds.

the same time that he gave a note for money borrowed at £6 per cent. interest, deposited title-deeds of land as a further security, and upon a further advance entered into a parol agreement with the lender, to execute a mortgage of the same lands as a security for the whole amount at £5 per cent. The deeds were not at that time and on that occasion delivered by the borrower to the lender, but had remained in the lender's possession from the time of the former transaction. Held, although the original deposit was invalid for usury, yet the parol agreement created a good equitable mortgage.[1]

3. It is remarked by a late writer,[2] "On a review of the decided cases, establishing this mode of mortgage security, it is perhaps to be regretted, that the old law was not adhered to, and the principle on which the statute of frauds was founded more respected. For although equity, by declaring the deposit itself to be evidence of an agreement executed, has contrived to evade the strict and literal wording of the statute, yet it is manifest that the door has been in some degree open to fraud and perjury; nor does a creditor seem to deserve much favor, who will not be at the trouble of a few lines in writing, if he is desirous to have a charge on his debtor's estate. If the debtor denies that the deposit was intended to cover future advances, or if he insist that the deeds were not delivered by way of deposit, but with a different intent, resort must, in many cases, be had to parol evidence; and, as remarked by Lord Eldon, 'the mischief of all these cases is, that the Court is deciding upon parol evidence with regard to an interest in land within the statute of frauds.'" So Judge Story says:[3] — "It is now settled in England, that if the debtor deposits his title-deeds to an estate with a creditor, as security for an antecedent debt, or upon a fresh loan of money, it is a valid agreement for a mortgage between the parties, and is not within the operation of the statute of frauds. This doctrine has sometimes been thought difficult to be maintained, either upon the

[1] James *v.* Rice, 27 Eng. Law & Eq. 342.

[2] Coote, 222.

[3] 2 Story's Eq. § 1020.

ground of principle or of public policy. And although it is firmly established, it has of late years been received with no small hesitation and disapprobation, and a disposition has been strongly evinced, not to enlarge its operation. It is not therefore ordinarily applied to enforce parol agreements to make a mortgage, or to make a deposit of title-deeds for such a purpose; but it is strictly confined to an actual, immediate, and *bonâ fide* deposit of the title-deeds with the creditor, as a security, in order to create the lien. Such an equitable mortgage will not, however, avail against a subsequent mortgagee, whose mortgage has been duly registered, without notice of the deposit of the title-deeds."

4. Notwithstanding these very reasonable strictures, however, a long series of cases seems to have fully established the doctrine above stated, as a rule of English equity jurisprudence. It is unnecessary to cite all of them; but some of the principal will be summarily referred to. (*c*)

(*c*) In Rolleston *v.* Morton, 1 Dr. & War. 195, the Lord Chancellor of Ireland said: "If a man has power to charge certain lands, and agrees to charge them, in equity he has actually charged them, and a court of equity will execute the charge."

In Keys *v.* Williams, 3 Y. & Coll. Exch. 60, 61, Lord Abinger thus very ingeniously vindicates the policy and reasonableness of the rule: — "The doctrine of equitable mortgages has been said to be an invasion of the statute of frauds; and no doubt there was great difficulty in knowing how to deal with deposits of deeds by way of security after the passing of that statute. But in my opinion that statute was never meant to affect the transaction of a man borrowing money and depositing his title-deeds as a pledge of payment. A court of law could not assist such a party to recover back his title-deeds by an action of trover, the answer to such an action being, that the title-deeds were pledged for a sum of money, and that, till the money is repaid, the party has no right to them. So, if the party came into equity for relief, he would be told, that before he sought equity he must do equity, by repaying the money in consideration for which the deeds had been lodged in the other party's hands. The doctrine of equitable mortgages, therefore, appears to have arisen from the necessity of the case. It may, however, in many cases, operate to useful purposes, and is certainly not injurious to commerce. In commercial transactions it may be frequently necessary to raise money on a

5. The deposit may be made either to the creditor himself, or to some third person over whom the depositor has no

---

sudden, before an opportunity can be afforded of investigating the title-deeds, and preparing the mortgage. Expediency, therefore, as well as necessity, has contributed to establish the general doctrine, although it may not altogether be in consistency with the statute."

In Pain *v.* Smith, 2 My. & K. 417, — (See Tylee *v.* Webb, 6 Beav. 552; Lewthwaite *v.* Clarkson, 2 Y. & Coll. Exch. 372,) — the plaintiff filed a bill, for the purpose of giving effect to an equitable security made by the deposit of deeds, and praying a sale of the estate. Per Sir John Leach, M. R.: "If the contract between the plaintiff and the defendant had been, that the deeds should be deposited as a security until a legal mortgage could be prepared, there would be ground for the argument of the defendant;" (namely, that if a sale were decreed, an equitable mortgagee would be in better situation than a legal mortgagee.) "But there being here a general equitable charge upon the property, the plaintiff is entitled to a sale for satisfaction of that charge, and such has been the constant course of the Court."

In Mandeville *v.* Welch, 5 Wheat. 284, Judge Story says: "It may be admitted, that according to the course of the authorities in England, and as applicable to the state of land-titles there, a deposit of title-deeds does, in the cases alluded to, create a lien, which will be recognized as an equitable mortgage, and will entitle the party to call for an assignment of the property included in the title-deeds. The doctrine proceeds upon the supposition, that the deposit is clearly established to have been made as *security* for the debt; and not upon the ground that the mere fact of a deposit unexplained affords such proof."

Where, in order to prevent immediate proceedings against a debtor, he deposited his title-deeds with the attorney of his creditor, for the purpose of preparing a mortgage; held, an equitable mortgage of the estate. Keys *v.* Williams, 3 Y. & Coll. Exch. 55. Lord Abinger says, (Ibid. 61, 62): "It has been very ably argued, that the circumstance of the deed having been deposited, not as a present security, but with a view to a future security, gives rise to such a distinction. Certainly, if before the money was advanced the deeds had been deposited with a view to prepare a future mortgage, such a transaction could not be considered as an equitable mortgage by deposit; but it is otherwise where there is a present advance, and the deeds are deposited under a promise to forbear suing, although only for the purpose of preparing a future mortgage. If it were necessary to decide the specific point, I should say, that an agreement to grant a mortgage for money already advanced, and a deposit of deeds for the purpose of preparing a mortgage, is, in itself, an equitable mortgage by deposit; but here the deposit was evidently made as

control. But not to the wife of the depositor, nor *à fortiori* if permitted to be retained by the debtor, though he deliver

---

a present security, as well as with a view of preparing a future mortgage. In default of payment of principal and interest, within the usual time, a sale must take place."

In Hockley *v.* Bantock, 1 Russ. 141, executors and trustees agreed to give a residuary legatee, as security for his share, a legal mortgage of real estate, which they had taken for a debt due to the testator, and, for the purpose of having the mortgage prepared, delivered the title-deeds to the agents of the legatee. Held, he thereby acquired an equitable lien as against the executors, though not as against the other legatees.

In Hodge *v.* Attorney-General, 3 Y. & Coll. Exch. 342, the title-deeds of a leasehold estate were deposited with bankers, by way of equitable mortgage, to secure the balance of a running account. The debtor being afterwards convicted of felony, the creditors filed a bill against the Attorney-general for a sale. Held, the legal title being in the Crown, the Court could not decree a sale, nor a conveyance of the legal title, but only declare the plaintiffs entitled to possession, till the Crown should redeem.

In Whitworth *v.* Gaugain, 3 Hare, 416, 424, 429, it was held, that an equitable mortgagee, by deposit of title-deeds, might enforce his lien in preference to another creditor, who subsequently, without notice, recovered judgment against the debtor, and obtained possession by writ of *elegit* and attornment of the tenants. Shadwell, V. C., says: "The plaintiffs are equitable mortgagees, by a deposit of title-deeds, accompanied with a memorandum in writing, explaining that the purpose of the deposit was to secure a then existing debt and future advances. No one, I apprehend, could seriously contend that the memorandum in writing above set forth had not the effect of charging the property as between the mortgagees and the mortgagor." His Lordship proceeds to lay down the established principle, that a judgment creditor stands in place of the debtor, and can take in execution only what belongs to him, subject to every liability binding upon the debtor himself. This principle applies to all other equitable incumbrancers, and should therefore be held alike applicable to an equitable mortgagee, whose title is no more imperfect than that of a *cestui que trust*. His Lordship further remarked, that the argument, of the judgment creditor's having an equal equity, and in addition the legal title, and therefore a right which ought to prevail over the plaintiff's, took for granted the whole question in dispute, assuming that the creditor might seize what did not actually belong to the debtor.

A., insisting that B., the owner of an agreement for a building lease,

to the creditor a memorandum to that effect. Nor will the equitable deposit in the hands of one person be extended to an advance made by another, unless the party holding the deeds is a mere trustee and has made no advances.[1] So, in Brizick *v.* Manners,[2] the owner of land delivered his title-deeds to an attorney for the purpose of having a mortgage drawn, but died before its completion. The creditor attempted to establish a title as equitable mortgagee, but the point was given up.

6. An equitable mortgagee may himself create an equitable mortgage, by a deposit of the deeds, though he does not deliver over the memorandum.[3]

7. A mere deposit, without a memorandum, will create an equitable mortgage, as against strangers, only when the possession of the title-deeds can be accounted for in no other way, or the holder is a stranger to the title and the lands.[4]

8. Such mortgage has preference over a subsequent pur-

[1] Coote, 217. [2] 9 Mod. 284. [3] Coote, 221. [4] Ibid. 217.

---

had deposited it to secure to him £900, claimed payment from the administrator of B., who had expended his own money in finishing the houses, and obtained leases from the lessors, and questioned the deposit and the extent of the advance, if any had been made. Held, the affidavits proving a deposit, the Court was bound to act upon them; that the deposit entitled A. to a mortgage, and gave him a right to payment. Decree for an account and sale of the houses. Sims *v.* Helling, 9 Eng. Law & Eq. 45.

In *Ex parte* Langston, 17 Ves. 230, on the 14th of June, title-deeds were deposited as security for advances. Between this time and June 20, further advances were made, and on the latter day a memorandum was signed by the debtor, stating that the deposit was made to secure the several advances. The same day, he became bankrupt. Held, the memorandum could not prejudice the creditor's claim, being perfectly consistent with it, and a ratification of the prior agreement; and that he was entitled to hold the deeds as security.

Mortgage by deposit, to secure the debtor's account, until such account should not exceed £100. The debtor having died, owing more than that sum; held, the deposit was a security for the whole sum, and not merely for the excess over £100. Ashton *v.* Dalton, 2 Coll. 565.

chaser or mortgagee of the legal estate with notice. And notice will be implied from the nature of the transaction; as, if the latter was informed that the creditor had possession of the deeds, and neglected to inquire for what purpose; this being gross negligence.[1] But this rule does not apply, where the holder of the deeds is solicitor of the debtor; such deposit being in this case according to the usual course of business.[2]

9. Such deposit gives a lien upon all the property included in the deeds, unless an intention is clearly proved to the contrary.[3]

10. With regard to the mode of *foreclosing* a mortgage of this description, Mr. Coote says, the proper decree would seem to be for *a foreclosure and conveyance*. The right to a *sale* does not appear so clear, though in some cases a sale has been decreed. Such right clearly exists, where the memorandum of deposit provides for a formal mortgage *with power of sale*, or where the bill is filed against the representatives of one deceased. So a sale would seem proper, when the defendants are infants.[4]

11. Six months will be allowed for redemption, although from the nature of the transaction no interest is due.[5]

12. With regard to the American doctrine upon this subject, Mr. Greenleaf remarks:[6] — "Whether the deposit of title-deeds alone will create an equitable lien on the land, in any of the United States, may well be doubted. No case is found, in which this doctrine has been actually administered, though in several cases it has been adverted to, as a rule of law in England."

13. In New York,[7] where there had been an advance of money, and the title-deeds were found in possession of the lender, there was held to be an equitable mortgage. So the deposit of a bond and accompanying mortgage of leasehold property, (given without consideration, for the purpose of

[1] Hiern *v.* Mill, 13 Ves. 114.
[2] Bozon *v.* Williams, 3 Y. & Jerv. 150.
[3] Ashton *v.* Dalton, 2 Coll. 565.
[4] Coote, 220.
[5] Ibid. 221.
[6] 2 Greenl. Cruise, 85, n.
[7] Rockwell *v.* Hobby, 2 Sandf. Ch. 9.

raising money,) as security for a loan, has been held to give a claim by the assignee against the mortgagor.[1] But it has been very recently decided in that State, that an instrument in the form of a mortgage, but naming no mortgagee, is not a valid security, in the hands of one who advances money, upon the agreement that he shall hold it as such security.[2] In a recent case in Rhode Island, it has been held, that the deposit of a conveyance of an estate as security for the amount of a mortgage upon such estate, which is relinquished by the mortgagee to the depositor to enable him to obtain the title from the holder of the equity of redemption, constitues an equitable mortgage as between the original parties and those subject to their equities, which a court of equity will establish and enforce by a sale of the depositor's interest, and the interest of those holding the legal title for him, or subject to his equity; especially if necessary to prevent a gross fraud and breach of trust from being practised by the purchaser upon the mortgagee.[3]

14. It has been held in Maine, that a grantee, whose deed is not recorded, cannot create an equitable mortgage by a pledge of the deed, and thus defeat a prior recorded mortgage.[4]

15. In Mississippi, a party cannot encumber his estate for a longer term than one year, by deposit of title-deeds.[5]

16. In California, delivering of the title-deeds, under a verbal contract for the sale of lands, is equivalent to possession by the vendee.[6]

17. In analogy with the doctrine above stated, there seems to have been an ancient rule in Chancery, that if a first mortgagee voluntarily left the title-deeds with the mortgagor, he should be postponed to a subsequent mortgagee, without notice, and in possession of the deeds; because he thereby enabled the mortgagor to impose upon others, who, in the absence of any registry, looked for their security only to the deed

[1] Day *v.* Perkins, 2 Sandf. Ch. 359.
[2] Chauncey *v.* Arnold, Law Reg. March, 1863, p. 317, 10 Smith.
[3] Hackett *v.* Reynolds, 4 R. I. 512.
[4] Hall *v.* McDuff, 11 Shepl. 311.
[5] Gothard *v.* Flynn, 25 Miss. 58.
[6] Tohler *v.* Folsom, 1 Cal. 207.

and the mortgagor's possession. Thus, in Head *v.* Egerton,[1] the Lord Chancellor said, it was hard enough upon a subsequent mortgagee, that he had lent his money upon lands subject to a prior mortgage, without notice of it, and therefore he could not add to his hardship, by taking away from him the title-deeds and giving them to the elder mortgagee, unless the first mortgagee paid him his money; especially as the first mortgagee, by leaving the title-deeds with the mortgagor, had been in some measure accessory in drawing in the defendant to lend his money. But Chancellor Kent, upon a review of the cases, denies the existence of any such rule; or that it is now in force, if ever adopted; and lays it down as the settled principle on the subject, that a subsequent mortgage shall not have priority for the reason stated, unless in case of fraud or gross negligence, or a voluntary, distinct, and unjustifiable concurrence, on the part of the first mortgagee, to the retaining of the deeds. More especially is the rule inapplicable in the United States, where deeds are uniformly recorded. Hence it was held, that, in case of the mortgage of a leasehold estate, leaving the lease with the mortgagor was no evidence of fraud, because registration is a beneficial substitute for the deposit of the deed, and gives better and more effectual security to subsequent mortgagees.[2] So Judge Story says: — "In cases not affected by the registry acts, the mere fact, that a first mortgagee has left the title-deeds in the possession of the mortgagor, without any attendant circumstances of fraud, will not be sufficient to postpone such first mortgagee to a second, who has taken the title-deeds with his mortgage, without any notice of the prior mortgage."[3] And it is remarked by Mr. Coote, that the question, how far possession of the title-deeds gives a subsequent mortgagee the preference over a prior one, has been one of frequent discussion. The principle to be derived

[1] 3 P. Wms. 279.

[2] Berry *v.* Mutual, &c., 2 Johns. Ch. 608, 609; Johnson *v.* Stagg, 2 Johns. 510; acc. Van Meter *v.* McFaddin, 8 B. Mon. 435; Shitz *v.* Dieffenbach, 3 Barr, 233. See Ryall *v.* Rolle, 1 Atk. 168; 1 Ves. 360; Atterbury *v.* Willis, 39 Eng. L. & Eq. 175; Colyer *v.* Finch, 39 Eng. L. & Eq. 8.

[3] 2 Story's Eq. § 1020.

from the cases is said to be, that want of possession of the title-deeds by the first mortgagee is open to explanation, and is only *primâ facie*, not conclusive evidence of fraud.[1] So it has been very recently held, that a legal mortgagee will not be postponed to a prior equitable one, on the ground of not having got in the title-deeds, unless guilty of fraud or gross or wilful negligence. As where he has made *bonâ fide* inquiry for them, and received a reasonable excuse for their non-delivery.[2] (*d*)

[1] Coote, 486.

[2] Hewitt *v.* Loosemore, 9 Eng. Law & Eq. 35.

(*d*) The doctrine above referred to, as to the effect of depositing title-deeds, has been stated as a rule of equity. Questions upon the same general subject have sometimes occurred in courts of law. In Goodtitle *v.* Morgan, (1 T. R. 755,) it was held, that a second mortgagee, who takes an assignment of a term to attend the inheritance, and has all the title-deeds, may recover in ejectment against the first mortgagee, not having had notice of the prior mortgage. Ashurst, J., says, (Ib. 762,) "No man ought to be so absurd as to make a purchase without looking at the title-deeds; if he is, he must take the consequence of his own negligence. If the first mortgagee had used ordinary precaution, he must have known that this term was then outstanding. And if he did know of it, and neglected to take an assignment of it, it was enabling the mortgagor to commit a fraud by mortgaging the same estate again. By this, therefore, he became *particeps criminis*." Buller, J., says, (Ib.) "It is an established rule in a court of equity that a second mortgagee, who has the title-deeds, without notice of any prior incumbrance, shall be preferred. If this has become a rule of property in a court of equity, it ought to be adopted in a court of law."

The assignees of a bankrupt, who owned the moiety of an estate in a register county, brought assumpsit for a moiety of the rents against the owner of the other half, who had received the whole rents. It appeared, that the defendant had lent the bankrupt a certain sum, to complete his part of the purchase, it being agreed that the title-deeds should be deposited as security. The defendant afterwards took an assignment of the bankrupt's moiety, but the assignment was not registered. The assignment from the commissioners to the assignees was duly registered, and therefore had preference over the unregistered deed. Held, the action could not be maintained, as the equitable mortgagee might have retained the rents against the bankrupt, if he had been solvent, and might therefore do the same against his assignees; and the requisition of registry did not apply to an equitable mortgage, where there was no deed to be registered. Sumpter *v.* Cooper, 2 B. & Ad. 223.

In Harrington *v.* Price, (3 B. & Ad. 170,) the vendor of an estate having, upon a groundless pretence, refused to deliver up the deeds; the purchaser transferred his title, and the assignee brought an action of trover for the deeds, and recovered judgment. Subsequently the first vendor deposited the deeds with the defendants, and absconded. The purchaser brought trover against the defendants, claiming that he was entitled to them as owner of the estate, though, after the conveyance to him, they were pawned to a third person without notice. Held, although a second mortgagee, obtaining the deeds without notice, might retain them against the first; the same rule did not apply to a prior purchaser, because a mortgagor generally retains possession of the property, and therefore his retaining the deeds is likely to mislead third persons; and that the plaintiff was entitled to recover. (See Hooper *v.* Ramsbottom, 6 Taun. 12; Head *v.* Egerton, 3 P. Wms. 280.)

Mr. Coote says, that previously to the establishment of this doctrine, (meaning the doctrine stated in the text,) it was held that mere possession of title-deeds gave no interest in the estate, except collaterally, as in the instance put by Lord Eldon (*ex parte* Whitbread, 19 Ves. 211); that is, if the owner of the land could not part with the estate without the deeds, he should not have them without paying the debt due from him to the holder; so that possession of the deeds gave no direct interest in the estate, but only a power of embarrassing the property in a sale. Coote, 214.

CHAPTER XXIII.

EQUITABLE MORTGAGES. — LIEN OF A VENDOR FOR THE PURCHASE-MONEY.

1. General nature of the lien.
3. Remarks upon the policy of the rule; whether it is consistent with the general doctrines relating to real property.
7. The doctrine is well settled by the weight of authorities.
8. Strictures and criticisms of the American courts. The rule is not adopted in some of the States.
9. But it is adopted in most of them; abstract of decisions upon the subject.
10. General nature of the lien; an *equitable* right.
20. Against what parties the lien may be enforced. Purchasers; by what notice they shall be affected.
27. Heirs.
28. Widow — husband and wife.
30. Creditors.
33. By whom the lien may be enforced.
37. *Waiver* and discharge of the lien of a vendor for the purchase-money, by taking security therefor, or by other acts and agreements.
53. Mode of enforcing the vendor's lien; bill, decree, &c.

1. Another implied lien (*a*) upon real estate — sometimes, like that considered in the last chapter, termed an

---

(*a*) See ch. 1, § 1, n. *An express agreement*, that land shall be chargeable with, and security for, the payment of a debt, though imperfect as a legal mortgage, will be regarded as a mortgage in equity, and enforced against a purchaser with notice. Davis *v.* Clay, 2 Mis. 161; Johnson *v.* Slawson, 1 Bai. Ch. 463.

A recital in the deed, that the vendor has a lien, so that the land cannot be sold until the notes are paid, shows that the lien exists, and is not to be contradicted by proof of a parol agreement that there should be no lien. Hutchinson *v.* Patrick, 22 Texas, 318.

An agreement to make a mortgage does not constitute a mortgage, as against subsequent judgment creditors. Price *v.* Cutts, 29 Geo. 142.

A written agreement, intended to give a lien for security of a debt, is a good equitable mortgage, though not lawfully witnessed for a conveyance of real estate. Abbott *v.* Godfrey, 1 Mann. (Mich.) 198.

If a school commissioner has sold school land, the statute requiring him to take a mortgage as security for the purchase-money, which he omits to

equitable mortgage — is *the lien of a vendor for the purchase-money.* This lien may properly be treated as *a mortgage*, both because an express mortgage, as has been abundantly shown in the foregoing pages, according to the established modern doctrine on the subject, creates no higher interest than a lien; and because the mode of enforcing the lien in question, and the general rights and remedies incident to it, are substantially similar to those created by an express mortgage. (*b*)

2. It has been already remarked, (*supra*, pp. 1, 2,) that one of the most common occasions for executing a mortgage occurs, where a conveyance of land is made, and a mortgage of the same land at the same time taken back by the grantor, to secure the whole or part of the purchase-money. The lien, to be considered in the present chapter, is a title substantially corresponding with that created by such a mortgage, but arising by implication merely, and not depending upon any deed or written instrument whatever. The doctrine of equity is, that a vendor of real estate, either merely selling, or both selling and conveying the property, without receiving payment of the purchase-money, retains a lien upon it as security for such purchase-money, or so much of it as remains unpaid.[1] "It has become one of the best established principles of natural equity — that estates are to be regarded as unconscientiously obtained, when the consideration is not paid."[2]

3. The mere statement of this rule, in its general terms, is sufficient to show, that it is an anomaly in the law of real property; certainly in that branch of the law, as modified

[1] See Farrar *v.* Winterton, 5 Beav. 1; Burns *v.* Taylor, 23 Ala. 255.

[2] Per Potter, J., Warren *v.* Fenn, 28 Barb. 334.

---

do, the lien is not lost, and may be enforced against subsequent purchasers, with notice, if proceedings are instituted for that purpose within a reasonable time. School Trustees *v.* Wright, 12 Ill. 432. See Chew *v.* Barnett, 11 S. & R. 389.

(*b*) See Haley *v.* Bennett, 5 Port. 452; Irwin *v.* Davidson, Ired. Ch. 311; Kelly *v.* Paine, 18 Ala. 371; Moore *v.* Anders, 14 Ark. 629.

and established by American statutes and judicial decisions. We have had repeated occasion to suggest, that *notoriety* or *publicity* is the settled and prominent requisition, applied to titles to real property in the United States. It is the universal policy of American law, to divest these titles of all secrecy, so that purchasers or creditors, by resorting to a public and general repository of deeds, may be able to ascertain, with an assurance little short of absolute certainty, to whom any particular estate belongs, and who therefore has power himself to pass a title. In the last chapter it was shown, that the mortgage by *deposit of title-deeds*, though as fully recognized in England as any other form of mortgage, has been repudiated in this country for the reason above suggested; its inconsistency with that *registry system*, which now constitutes an elementary part of our jurisprudence, and is undoubtedly one of the most useful innovations upon the common law of real property. It will be seen, however, that this consideration, though as forcible in the present case as in the other, and though its force has often been admitted by our courts; has not proved sufficient to prevent the general adoption of the English rule.

4. Besides the objection to the doctrine in question, arising from its want of harmony with the prevailing policy of American law, there is no topic in the law of mortgages, in relation to which the decisions are more confused and variable. As will be hereafter more particularly stated, the origin of the rule is referred to the *civil law*. But that law adopted the same rule in regard to both real and personal property; (*c*) giving the vendor of each a lien upon the thing

(*c*) See Warren *v.* Fenn, 28 Barb. 334. Contrary to the rule of the civil law, as respects personal property, no lien exists by implication of law, and in no other mode can a valid lien be created in favor of the seller, when the legal title and possession have been parted with, than by express contract, which, at least, as against creditors and subsequent purchasers without notice, must (in Tennessee) be in writing, and duly proved and registered. Woods *v.* Burrough, 2 Head, (Tenn.) 202.

It has been held that a vendor of *grass*, (which may be regarded as par-

sold, until payment of the price; or, to speak more accurately, making payment of the price a condition precedent to any title whatever in the vendee. (*d*) There would seem to be no good reason for abandoning this principle in regard to personal estate, which has unquestionably been done by the common law, except in allowing the vendor a lien *while he holds possession;* and adhering to it, with reference to real estate, alike where the vendor or the vendee is in possession, and notwithstanding the latter may exhibit in his own hands and upon the public records a perfect documentary title.

5. It may be mentioned, as another illustration of the uncertainty attending this doctrine, that the cases constantly speak of it, as alike applicable, whether the vendor has actually conveyed, or merely contracted to convey, the legal title; (*e*) of course involving the conclusion, that the nature

---

taking of the nature of realty,) sold on credit, with a license to cut it, but no reservation of a lien, cannot claim such lien for the payment of the purchase-money. Cutler *v.* Pope, 1 Shepl. 377.

A. hired a piece of land from B., for which he was to pay a certain price per acre, and the stalks after the corn was harvested. Held, B. had no lien upon the corn for the price. Loomis *v.* Lincoln, 24 Vt. 153.

But it is also held, that, where personal property is sold, under an agreement that it shall be mortgaged for the price, the purchase-money will be a lien on the property, though no mortgage is executed. Alexander *v.* Heriot, 1 Bailey, Ch. 223.

Where one sells standing wood, with authority to cut it within a limited time, he has no lien upon the wood in case of the purchaser's insolvency after the cutting and before removal of the wood. Douglas *v.* Shumway, 13 Gray, 498.

(*d*) "Quod vendidi non aliter *fit* accipientis, quam si aut pretium nobis solutum sit," &c. Dig. lib. 18, tit. 1.

(*e*) See Mims *v.* Macon, &c. 3 Kelly, 341; Walker *v.* Sedgwick, 8 Cal. 398; Gilkeson *v.* Snyder, 8 W. & S. 200. And an actual conveyance, in fulfilment of a previous bond to convey, does not discharge the lien. Owen *v.* Moore, 14 Ala. 640. See Pintard *v.* Goodloe, 1 Hemp. 502; Amory *v.* Reilly, 9 Ind. 490.

Late cases seem to appreciate the absurdity of claiming a lien upon one's own legal estate, and the manifest distinction between the titles of the re-

of his title is the same in both instances. And yet it is difficult to understand, how a party can have a *lien* upon prop-

---

spective parties, as they exist after a mere contract to convey, and after an actual conveyance. In Virginia, the vendor's lien has been abolished by statute; but the right of a vendor who retains the legal title as security is held to be of an entirely different nature, and the vendee's purchasers take only the vendee's equitable right to have a conveyance upon payment or satisfaction of the price. And where the conveyance was not to be made until the price was paid, the vendee giving his bond therefor; and afterwards he gave his bond, with the vendor as surety, to one of the vendor's creditors, and the former bond was thereupon cancelled; and, the vendee failing, the vendor paid the bond to the creditor: held, by this mere shifting of securities the price was not satisfied, and the vendor should hold the land until payment as against the vendee's grantees and creditors. Yancy *v.* Mauck, 15 Gratt. 300. See Servis *v.* Beatty, 32 Miss. 52; Walker *v.* Sedgwick, 8 Cal. 398. It is held, that after a contract the vendor holds the legal title in trust; while after a conveyance his interest is strictly a lien. Neil *v.* Kinney, 10 Ohio St. 67. And in Pennsylvania it is distinctly held, that "before conveyance, a vendor has a lien by virtue of the title; after it, he has no lien except it be by judgment or mortgage." Per Thompson, J., Stephens's, &c., 38 Penn. 13. See Springer *v.* Walters, 34 Ibid. 328; Neas's, &c., 31 Ibid. 293.

The question of lien may arise in case of an *invalid* deed. Thus where, through fraud between a vendee and the administrator of the vendor, who died before giving a deed, a deed is made without payment; such deed is not void, but voidable, and subject to a lien for the price. Servis *v.* Beatty, 32 Miss. 52.

Where one bought land, and on delivery of the deed gave a judgment for the purchase-money; it was held, that the lien for purchase-money was prior to that of judgments entered against him while he held the land under an agreement to convey. Cake's appeal, 23 Penn 186.

An interesting and important case, illustrative of the general subject of *equitable* claims and allowances in case of mortgage, without reference to the strict legal title of the respective parties, recently arose in Connecticut. The facts were briefly these: A. and B. and the defendants (a company), entered into a contract, that A. and B. should manufacture rifles for the defendants, in a factory to be erected by A. and B. upon land conveyed to the company. After the erection of the factory, A. and B. made a mortgage of it, which mortgage was afterwards assigned to the plaintiff, on behalf of the British government, who brings this bill in equity to redeem. The original contract provided, that the defendants should make advances to A. and B. for the manufacturing business, which were accordingly made to a large

erty, of which he at the same time has the absolute legal ownership; or how the same term can be accurately employed to denote such ownership, subject to a mere executory agreement for conveyance, and the very shadowy interest, "neither property nor a right of action, neither *jus in re* nor *jus ad rem*," which remains in the vendor after an actual transfer to the vendee. In the former case, the lien consists in the vendor's right to withhold a deed until the price be paid; in the latter, it authorizes the same or similar proceedings against the land, treated as the vendee's property, as in case of an express mortgage; and these two rights have little else in common but the name which is alike applied to them.

6. The same want of certainty prevails, in relation to the parties by and against whom the lien may be enforced, and to the acts or agreements by which it may be waived or discharged. And, upon a view of the whole subject, it may be safely said, that the entire disuse or abrogation of such lien in the United States would greatly contribute to the security of titles to real property, and put an end to many complicated and embarrassing controversies, by substituting clear, written words of conveyance, for presumed intention and vague and conflicting equities.

7. Notwithstanding the obvious objections to this rule of law, which have been above stated, it is still undoubtedly well settled by judicial decisions. Thus it is said by the

---

amount, and upon the failure of A. and B. they were largely indebted to the defendants. They also failed to fulfil their contract with the defendants. It was held, that the defendants should hold the property for all advances made conformably with the contract, even after notice of the mortgage. It further appeared, that by the contract the defendants were authorized to take the property at an appraisal, which, pending this suit, they decided to do; and, by a supplemental bill, the petitioner claimed the balance of the value, after deducting the defendants' claim. The defendants, on the other hand, claimed to offset a demand against the British government, relating to certain breaches of contract for the manufacture of rifles; and this set-off was allowed. Rowan *v.* Sharps', &c., 29 Conn. 282.

Court in North Carolina:[1] "That this is the doctrine of the English Court of Chancery, there can be no doubt. It is established by many authorities, and running through many years of the judicial history of that country." And in another case, in Georgia, with more particular reference to the objection against the doctrine arising from *the statute of frauds*, (*f*) it is said: — "It is not, perhaps, so strong a case as that of a mortgage implied by a deposit of the title-deeds of real estate, which seems directly against the policy of the statute, but which nevertheless has been unhesitatingly sustained."[2] (*g*) So in Vermont, (*h*) the only

[1] Per Nash, J., Womble *v.* Battle, 3 Ired. Eq. 183.
[2] Mims *v.* Macon, &c. 3 Kelly, 341.

(*f*) Such lien is said to fall under the head of *constructive trusts*, to which the statute of frauds does not apply. It is said to be neither *jus in re*, nor *jus ad rem*, neither property nor a right of action, but a *charge*. 1 Hill. on R. P. 475; Pintard *v.* Goodloe, 1 Hemp. 502; Houston *v.* Stanton, 11 Ala. 412; Warren *v.* Fenn, 28 Barb. 334; Wood *v.* Lester, 29 Barb. 152; Skaggs *v.* Nelson, 25 Miss. 18.* But it cannot be created, it is said, by parol agreement. Ibid. So if, in an action on a note alleged to have been given for the price of land, the plaintiff prays for an enforcement of his lien, the sale cannot be proved by parol evidence. Farmer *v.* Simpson, 6 Tex. 303.

(*g*) We have already adverted (*supra*, § 3,) to the inconsistency of the American courts, in recognizing the implied lien of a vendor, and at the same time rejecting the equally well-settled English doctrine of a mortgage by deposit of deeds.

(*h*) By a late statute (1851, 42 Gen. Sts. 452,) the lien is abolished.

* A. held the bond of B. for the conveyance of certain land when the purchase-money should be paid. On payment of the purchase-money, A. took no deed. Subsequently, he sold the land to C. on a credit, and requested B. to make the deed to C., which was done, the deed acknowledging the receipt of the purchase-money. C. then made a mortgage to D., to secure a preëxisting debt, he having no actual notice that the purchase-money had not been paid. When the mortgage was executed, B.'s deed was exhibited to him to show the title. A. remained in possession of the land after it had been conveyed to C., though without any contract allowing him to do so. Held, that A.'s possession and title, after the conveyance to C., were those of a tenant at sufferance. Also, that A.'s lien for the purchase-money, if he had any, constituted no title, legal or equitable, and that his occupancy was in no way connected with that lien. Work *v.* Brayton, 5 Ind. (Porter,) 396.

State in New England where the rule has been expressly sanctioned, the Court remark: — "It is a highly equitable doctrine, and eminently consistent with the most perfect notions of moral justice. It has existed in the English equity courts for centuries. It has been adopted in most of the American States, whose equity systems may be regarded as at all settled, and in the national courts."[1] To the same effect Judge Story says:[2] — "It has often been objected, that the creation of such a trust by courts of equity is in contravention of the policy of the statute of frauds. But whatever may be the original force of such an objection, the doctrine is now too firmly established to be shaken by any mere theoretical doubts. Courts of equity have proceeded upon the ground, that the trust, (*i*) being raised by implication, is not within the purview of that statute, but is excepted from it. It is not, perhaps, so strong a case as that of a mortgage implied by a deposit of the title-deeds of real estate, which seems directly against the policy of the statute, but which nevertheless has been unhesitatingly sustained." The same author further remarks:[3] — "The true origin of the doctrine may with high probability be ascribed to the Roman law, from which it was imported into the equity jurisprudence of England. (*j*) By the Roman law, the vendor of property sold had a privilege, or right of priority of payment, in the nature of a lien on the property, for the price for which it was sold, not only against the vendee and his representatives, but against his creditors and also against subsequent purchasers from him. For it was a rule of that law, that although the sale passed the title and dominion in

[1] Per Redfield, J., Manly *v.* Slason, 21 Verm. 271.

[2] 2 Story's Eq. § 1218.

[3] Ibid. 1221.

(*i*) See Mims *v.* Macon, &c. 3 Kelly, 341.

(*j*) Acc. Clower *v.* Rawlings, 9 Sm. & M. 122; Atwood *v.* Vincent, 17 Conn. 583; Warren *v.* Fenn, 28 Barb. 334. One ground of the rule is, that payment is *part of the contract.* Ibid. It is also rested on the ground of *good conscience.* Mims *v.* Macon, &c. 3 Kelly, 342; 28 Barb. 334.

the thing sold, yet it also implied a condition that the vendee should not be master of the thing so sold, unless he had paid the price, or had otherwise satisfied the vendor in respect thereof, or a personal credit had been given to him without satisfaction."

8. As might be supposed, however, from the anomalous character of this doctrine, it has been made the subject of some severe strictures in the American courts. Thus, in Bayley *v.* Greenleaf,[1] Marshall, C. J., remarks substantially as follows. Whether the lien of a vendor be established as a natural equity, or from analogy to the principle, that a bargainor holds *in trust* for the bargainee till the price is paid; it is still a secret, invisible trust. The vendee appears to hold, divested of any trust, and gains credit, upon the confidence that he is the owner in equity as well as at law. A vendor ought to take a mortgage, for the purpose of general notice; otherwise, he is in some degree accessory to a fraud. It would seem inconsistent with the principles of equity and with the general spirit of our laws, that such a lien should be set up in a court of chancery, to the exclusion of *bonâ fide* creditors. In the United States, the claims of creditors stand on high ground. There is not perhaps a State in the Union, the laws of which fail to make all conveyances not recorded, and all secret trusts void, as to creditors, as well as subsequent purchasers without notice. To support the secret lien of a vendor against a creditor, who is a mortgagee, would be to counteract the spirit of these laws. Judge Marshall examines the conflicting English decisions upon the subject, and also the remarks of Mr. Sugden, apparently contradictory to the opinion of the Court in this case; and draws a distinction between a conveyance made by the debtor himself, to secure one or more creditors, or creditors generally, and an assignment under an insolvent or bankrupt law, which the law does not regard as made for valuable consideration, but as merely substituting the as-

[1] 7 Wheat. 46. See Gill *v.* M'Attee, 2 Md. Ch. 255; Ott *v.* King, 8 Gratt. 224; Wood *v.* Lester, 29 Barb. 152.

signee in place of the debtor. (*k*) So, in Maine, the Court remark as follows: — "Such a doctrine may be unobjectionable in a country where the lands have been cultivated for a great length of time, and where the change of property is comparatively infrequent. But in this State, where so great a portion of them are uncultivated, and where titles are subject to such constant change, the doctrine would be so unsuited to the actual condition of things, as to act unfavorably, if not oppressively upon our citizens. The policy of our law is opposed to that of Great Britain in this, that it encourages the distribution of estates and property among all the people; and any rule of law suited to restrain it cannot be received as a part of our law merely because it has been long the established law there. In this State, the public registry is designed to exhibit to all persons the state of the title, while in that country such means of information have not existed except to a limited extent. To admit such a lien would tend greatly to diminish the confidence held out by the law, as fitting to be reposed in such records."[1] And in North Carolina, in a case overruling some prior decisions, which had recognized the rule as part of the law of that State, the Court remark: — "Every rule adopted by the Courts, whereby the titles to real property shall be affected, should be plain and perspicuous. A system, then, complex in its nature, and leading to uncertainty and confusion, ought not to be adopted unless imperiously demanded, either by natural justice or necessity."[2] So, in Pennsylvania, in the case of Stouffer *v.* Coleman,[3] where a writing was executed between two parties, called an *article of agreement*, with a covenant for a subsequent conveyance by a good and sufficient deed, but also conveying by words of

[1] Per Shepley, C. J., Philbrook *v.* Delano, 29 Maine, 414, 415.

[2] Per Nash, J., Womble *v.* Battle, 3 Ired. Eq. 186; acc. Cameron *v.* Mason, 7 Ired. Eq. 180.

[3] 1 Yeates, 393.

(*k*) Acc. Marine, &c. *v.* Early, Charl. R. M. 279; Shirley *v.* Sugar, &c. 2 Edw. Ch. 505; Van Doren *v.* Todd, 2 Green, Ch. 397.

actual grant; and a bond was given for the price of the land: it was stated by the Court, that these facts presented two questions for their consideration: first, whether the party did sell and convey, or only agree to do it; second, whether the lien was not waived by taking security for the price. In the later case of Kauffelt *v.* Bower,[1] the same Court remarked, that in the former case the doctrine of equitable lien could not apply, because the vendor still retained the legal title. They proceed to disavow the English doctrine upon the subject, as a rule of law in Pennsylvania, upon the ground that it was first adopted three years after the charter to Penn; that it was impracticable, for want of full equity powers in the Court, and contrary to the general understanding and practice, and to the universal policy of the law concerning the registration of deeds, the liens of mechanics, judgment creditors, creditors of deceased persons, &c., and would involve the greatest confusion and uncertainty of titles. The Court further remark, that the doctrine had been recognized in only two cases in that State: Stouffer *v.* Coleman, and Irvine *v.* Campbell, which was merely a purchase of the equitable title, the instrument being in form executory, and containing a covenant for further assurance. (*l*)

9. But, notwithstanding these dissenting views, *the lien of a vendor for the purchase-money* must undoubtedly be considered as a settled principle of American law, so far as this

[1] 7 S. & R. 64.

(*l*) Agreement in writing for the sale of land, a certain sum to be paid on the vendor's death, and certain duties to be performed by the vendee during the vendor's life. The vendor made a deed of the land, "subject to the reserves mentioned in the article, which reserves are to continue during the grantor's life." Held, the agreement and deed, construed together, created no lien for the purchase-money. Zentmyer *v.* Mittower, 5 Barr, 403.

In the same State (Pennsylvania), it is held, that an agreement between grantor and grantee, executed and recorded the same day with the deed, that the purchase-money should be a lien upon the land, does not interfere with the title of subsequent judgment creditors of the grantee. McLanahan *v.* Reeside, 9 Watts, 508.

depends upon the weight of authority. It appears to have been sanctioned in the States of New York, (*m*) New Jersey, Maryland, Virginia, (*n*) Tennessee, Texas, Mississippi, Georgia, Alabama, Missouri, Michigan, Illinois, Indiana, Ohio, Kentucky, (*o*) and Vermont; but rejected in Massachusetts, Maine, Pennsylvania, (*p*) and North Carolina. (*q*) Whether it is adopted or rejected in South Carolina (*r*) and Delaware, seems somewhat doubtful.[1] (*s*) It is said never to have been

[1] 2 Sugd. (Amer.) 324, n.; Manly *v.* Slason, 21 Verm. 271; Weed *v.* Beebe, Ib. 495; Moore *v.* Holcombe, 3 Leigh, 597; Conover *v.* Warren, 1 Gilm. 498; Howard *v.* Davis, 6 Tex. 174; Stewart *v.* Ives, 1 Sm. & M. 197; May *v.* Lewis, 22 Ala. 646; Harring. Ch. 225; Budd *v.* Bush, 1 Harring. 69; Brinkerhoff *v.* Vansciner, 3 Green, Ch. 251; Carr *v.* Hobbs, 11 Md. 285; Owen *v.* Moore, 14 Ala. 640; Philbrook *v.* Delano, 29 Maine, 410; Herbert *v.* Schofield, 1 Stock. 492; English *v.* Russell, 1 Hemp. 35; Mims *v.* Lockett, 23 Geo. 237.

(*m*) In this State, it is very recently held, that, after a contract to sell, the vendor has merely a lien upon the land; that he becomes a trustee, and his interest is personal estate, especially where the purchaser takes possession. Smith *v.* Gage, Law Reg. May, 1863, p. 438.

(*n*) It is now provided by statute (Code, 510,) that the lien shall not exist, unless expressly reserved. See Yancy *v.* Mauck, 15 Gratt. 300.

(*o*) Under a statute of this State, the delivery of a deed, not reciting what part of the price is unpaid, is a waiver of the lien. Cottman *v.* Martin, 1 Met. 563.

(*p*) See Hepburn *v.* Snyder, 3 Barr, 72.

(*q*) The following is a summary view of the course of decisions in this State: — That it is doubtful whether a vendor has a lien, as against volunteers and purchasers with notice. Johnson *v.* Cawthorn, 1 Dev. & Bat. Ch. 32. But such lien certainly does not exist after a sale on execution, or a sale under a decree of Court, under the act of 1789, for debts of the vendee. Ibid. Harper *v.* Williams, 1 Dev. & B. Ch. 379. Nor as against a *bonâ fide* purchaser from the vendee, without notice, if it exists in any case. Gahee *v.* Sneed, 1 Dev. & Bat. Ch. 333. That, where land was sold, to be conveyed upon payment of the price, and, after the death of the vendor, the purchaser filed a bill against his heirs for a conveyance, which being taken *pro confesso*, the Court decreed a conveyance, without noticing the non-payment of the purchase-money; such decree did not destroy the vendor's lien for the price. Winborn *v.* Gorrell, 3 Ired. Ch. 117. And, finally, that the vendor of land has not an equitable lien thereon for the price. Womble *v.* Battle, 3 Ired. Ch. 182; Henderson *v.* Burton, Ib. 259.

(*r*) See Wragg *v.* Comptroller, &c., 2 Desaus. 509.

(*s*) In Iowa, by a recent act, the vendor of real estate, when part or all

adopted in its extent in Connecticut, and to exist only where the vendor's object is money, and he has no other security.[1] (*t*) In a later case, in the same State,[2] Church, J., says, "in this State, we have not yet had occasion to resort to it." (*u*)

[1] Meigs *v.* Dimock, 6 Conn. 464. See Watson *v.* Wells, 5, 468; Dean *v.* Dean, 6, 285.
[2] Atwood *v.* Vincent, 17 Conn. 583.

---

of the purchase-money remains unpaid after the day fixed for payment, whether time is or is not the essence of the contract, may file his petition, asking the Court to require the purchaser to perform his contract, or to foreclose and sell his interest in the property. The vendee in such case shall be treated as a mortgagor. Rev. Stat. (Iowa,) 1860, p. 651.

(*t*) The plaintiff sold and conveyed land to Watson, taking notes of hand and a mortgage for the price. One of the witnesses to the mortgage accidentally omitted to sign his name, but it was duly recorded. The defendants, being partners and creditors of Watson, afterwards took from him a deed of the land, one of them having actual notice of the facts of the case. The plaintiff brings a bill in equity, setting forth this defect in the mortgage, and praying for confirmation of his title. It was held, in part upon the ground of a vendor's equitable lien, that the plaintiff was entitled to a decree. Watson *v.* Wells, 5 Conn. 468.

(*u*) It is unnecessary, and would be useless, to cite all the numerous cases, which recognize or establish the doctrine in question. In Fish *v.* Howland, (1 Paige, 24–30,) Chancellor Walworth gives the following valuable abstract of the most important among them: —

In Chapman *v.* Tanner, (1 Vern. 267,) the earliest case, which occurred in 1684, Lord Guilford held, that where the purchaser had become bankrupt, the vendor had a lien for the price of the land, upon a principle of natural equity, and did not stand on the footing of a general creditor.* In Bond *v.* Kent, (2 Ibid. 281,) a mortgage was given for part of the price, and a note for the rest. Held, there was no lien for the amount of the note. In Coppin *v.* Coppin, (2 P. Wms. 291,) Lord King held there was a lien, though a receipt for the price was indorsed upon the deed. In this case, the question of lien was a subordinate and incidental one. In Pollexfen *v.* Moore, (3 Atk. 272,) the conveyances being retained, Lord Hardwicke held the land chargeable with a lien in the hands of the heir. In Burgess *v.* Wheat, (1 Ed. 211,) the general principle is sanctioned. In Tardiffe *v.*

* In this case, however, it is said, (Fawell *v.* Heelis, Amb. 726; Tardiffe *v.* Schrugan, 1 Bro. 424, n. *b*,) that there was a special agreement for the vendor's retaining the title-deeds.

10. With regard to the general nature of the lien in question, as has been already remarked, it does not depend on

---

Schrugan, (cited 1 Bro. 423,) a conveyance was made to two daughters of the grantor, in consideration of an annuity, for which they gave him their joint bond. One of them having married and died, her husband, who had a life-estate in a moiety of the land, refused to pay any part of the annuity. The other sister and her husband then filed a bill in equity against them. Held, by Lord Camden, that a moiety of the annuity was a lien upon the land in the defendant's hands; and decreed, that he pay a moiety of the arrears, and keep down a moiety of the future payments. In Fawell *v.* Heelis,* (Amb. 724,) Lord Bathurst held, that the lien was discharged, by taking the purchaser's bond, payable at a future time. In Blackburn *v.* Gregson, (1 Bro. 420; 1 Cox, 90,) the same point was raised, but not decided. In Austen *v.* Halsey, (6 Ves. 475,) which was a claim of lien by a legatee, Lord Eldon ruled that the vendor has such lien, unless the contract clearly shows a contrary intention. In Nairn *v.* Prowse, (Ibid. 752,) Sir William Grant recognized the general rule, but remarked, that if the vendor does not trust to the lien, but carves out a security for himself, it is doubtful whether the lien is or is not waived. In Elliot *v.* Edwards, (3 Bos. & P. 181,) the holder of a lease assigned it, with a proviso, that the assignee should not transfer, &c., till payment of the price, and took security from a third person. Held, the vendor still had a lien for the price. In Hughes *v.* Kearney, (1 Sch. & Lef. 132,) the purchaser gave a note for the price, which was delivered to a third person as trustee, till the incumbrances could be ascertained and paid off therefrom, the balance to be paid to the vendor. Held, the amount of the note was a lien, as against an heir of the purchaser. In Mackreth *v.* Symmons,† (15 Ves. 329,) a lien was held to exist, though a bond had been given for the price; and Lord Eldon suggested, that taking a mortgage upon another estate, as security, might not be a waiver. In Grant *v.* Mills, (2 Ves. & B. 306,) the purchaser had drawn bills upon himself and his partner, which were accepted, payable on time, and delivered them to the vendor. Held, such bills were to be regarded as a *mode of payment*, not as security, and the lien still continued. In *Ex parte* Peake, (1 Mad. 346,) it was held that a bill, and in *Ex parte* Loaring, (2 Rose, Bankr. 79.) that a negotiable note, on time, which was discounted and afterwards dishonored, was no waiver. So in Saunders *v.* Leslie, (2 Ball & B. 514,) in regard to a note or bond, payable on time. But in Winter *v.* Lord

* This case is said to have been often overruled.

† This case is made the basis of very valuable English and American notes upon the general subject of a vendor's lien for the purchase-money, in 1 White's Leading Cases in Equity, 336.

possession, and exists alike in the cases of an actual sale and a mere executory contract. So in case of an *exchange* of lands.[1] (*v*) Nor does it depend on any express assent or agreement of parties, though sometimes said to rest upon this foundation. It is implied from a presumed intention of the parties,[2] and *incident to the contract*.[3] And in some cases is held valid, though the contract itself be in other respects void. As in case of *infancy*. (*w*) The lien is presumed to exist *primâ facie*, but may be negatived by special circumstances. (*x*) Thus it is said not to exist, where the

[1] Burns *v.* Taylor, 23 Ala. 255.
[2] Servis *v.* Beatty, 32 Miss. 52.
[3] Brinkerhoff *v.* Vausciven, 3 Green, Ch. 251.

Anson, (1 Sim. & St. 434,) where the purchaser gave his bond, payable at the death of the vendor, with interest annually, and a receipt for the money was indorsed upon the deed; held, there was no lien, the vendor evidently intending to part with the estate immediately, and to wait for payment of the price.

(*v*) Upon an exchange of farms between A. and B., A. covenanted to discharge a mortgage upon the farm given in exchange by him, and afterwards loaned the money of a third person, to discharge the mortgage, under an agreement afterwards performed, that the mortgage should be assigned to the lender as security. Held, the assignee was entitled to a preference, for the amount advanced by him, over a person to whom B. had subsequently mortgaged the land to secure a preëxisting debt. White *v.* Knapp, 8 Paige, 173.

(*w*) Thus, where an infant purchaser paid part of the price; in a suit for the balance, set up his minority and prevailed; and, after coming of age, conveyed to one having notice of all the facts: — held, the vendor retained a lien for the price, and might enforce it in equity without restoring or offering to restore the sum paid him; although, after the conveyance to the infant, but before the latter had avoided it, the plaintiff had quitclaimed to another person. Weed *v.* Beebe, 21 Verm. 495.

But, on the other hand, it is held, that such lien is not a mortgage, but has merely the incidents of a mortgage: it consists solely in debt, and must be subject to all the incidents of the debt, and cannot be enforced if the debt cannot be. When the note is barred by the statute of limitations, the remedy to enforce the equitable lien is also barred. Trotter *v.* Erwin, 27 Miss. 772.

(*x*) On the other hand, it is said, there must be *clear proof* of the inten-

object of the sale was not money, but some collateral benefit.[1] A *special contract* for payment of the purchase-money, in order to defeat the lien, must be explicit, even if it ever of itself has this effect; and, though the contract is stated in the conveyance, evidence may be given of the true bargain, and a subsequent purchaser is bound to inquire whether it was intended to waive the lien.[2] But there was held to be no lien, where a part of the consideration consisted in a conveyance by the vendee to the vendor of other land, with a covenant against incumbrances, which covenant was broken by an existing incumbrance. In such case, at any rate, the vendor cannot claim a lien till he has removed such incumbrance.[3]

11. Judge Story says: — "The lien of a vendor for the purchase-money is not of so high and stringent a nature as that of a judgment creditor, for the latter binds the land according to the course of the common law, whereas the former is the mere creature of a court of equity, which it moulds and fashions according to its own purposes. It is, in short, a right which has no existence, until it is established by the decree of a Court in the particular case; and is then made subservient to all the other equities between the parties, and enforced in its own peculiar manner, and upon its own peculiar principles. It is not, therefore, an equitable estate in the land itself, although that appellation is loosely applied to it." [4] It gives no claim to *the profits* of the land; [5] nor to the back-rents, when enforced.[6] But the vendor may

[1] 1 Hill. R. P. 474; Sears *v.* Smith, 2 Mich. 243; Tierman *v.* Beam, 2 Ham. 383; Van Doren *v.* Todd, 2 Green, Ch. 397.

[2] Frail *v.* Ellis, 7 Eng. Law & Eq. 457.

[3] Hare *v.* Van Deusen, 32 Barb. 92.

[4] Gilman *v.* Brown, 1 Mas. 191, 221.

[5] Little *v.* Brown, 2 Leigh, 353. But see Irwin *v.* Davidson, Ired. Ch. 311.

[6] Medley *v.* Davis, 5 Humph. 387.

---

tion of the parties, and of the sum due. Williams *v.* Stratton, 10 Sm. & M. 418.

In an action on a note, alleged to have been given for land sold, with a prayer that a lien on the land might be enforced; it was held, that the sale could not be established by parol testimony. Farmer *v.* Simpson, 6 Tex. 303.

claim rents paid to a receiver, pending the bill.[1] And it has been held an *insurable* interest.[2]

12. This lien, like most other equitable rights or claims, exists only in a court of equity. (*y*) And it is said to be a relief afforded only there on the ordinary ground that the claimant is remediless in a court of law. If the vendor can, by any proceeding at law, recover the amount due him, chancery never interferes to enable him to assert his equitable lien. His remedy at law must be first exhausted, or it must be shown that none exists there. When, therefore, a vendor

[1] Medley *v.* Davis, 5 Humph. 387. [2] Tyler *v.* Ætna, &c., 16 Wend. 385.

(*y*) See Houston *v.* Stanton, 11 Ala. 412. *At law*, the clause acknowledging receipt of the purchase-money is held conclusive, except in case of fraud. Rowntree *v.* Jacob, 2 Taunt. 141. An *equitable estate* may itself be the subject of an equitable lien. Warren *v.* Fenn, 28 Barb. 333.

In a late case in Pennsylvania, the precise respective interests of the vendor and vendee, in reference to lien, were brought in question, in the construction of a statute, which provides that the Court may make an order, in case of *extent*, for distribution among lien creditors, as upon a sheriff's sale. It was held, that the unpaid purchase-money due on articles of agreement is not a lien, which can properly be laid before a sheriff's inquest, to determine whether the rental of the vendee's estate, levied on, will in seven years be sufficient, beyond all reprise, to satisfy the execution. Springer *v.* Walters, 34 Penn. 328.

Upon the general subject of lien, the Court made the following remarks: "When the vendee's interest alone is sold on execution, the purchase-money due the vendor is not paid out of the proceeds — because it is not a lien on the equitable estate, but on the legal, by virtue of the title. When the vendor sells upon a judgment for purchase-money then he is paid according to his priority of lien on the land, both the legal and equitable estates being sold. The principle of distribution of the proceeds of the equitable estate is the same, whether in sales, or by extent of the land, and order of the Court. In neither case, can the vendor's lien be affected, or he be entitled to any money in the distribution, on account of the legal title. The interest of the vendee under articles, is a distinct interest from the legal title; it can be bound as such and sold as such, without interfering with the legal estate. Inasmuch, therefore, as the vendor's claim cannot come in on the purchase-money, I cannot see why it should be the means of sending to sale property, the proceeds of which could not be applied to its extinguishment." Per Thompson, J., Ibid. 329.

goes into equity, seeking to enforce such a lien, he must show that he has no redress at law.[1] Hence it was held insufficient to allege, without proving, a seizure on execution of other property; and also held necessary to show, that the debtor had no other property.[2] And, on the other hand, a lien is not necessarily implied from a decree or judgment for the purchase-money.[3] It is also held that suits for the debt and the land cannot be maintained concurrently.[4] So it is held, that a vendor can enforce his lien only in case of a deficiency of personal estate of his debtor; and a bill to enforce such lien, it not appearing that the debt cannot be made at law, will be dismissed,[5] more especially if the vendee lives out of the State.[6] But, on the other hand, it has been sometimes held, that a vendor may enforce his equitable lien without proceeding at law.[7] Or, where the bond for a title has been *assigned*. In such case, though he might maintain ejectment for the land, that remedy is said to be not complete, as a recovery would not affect the contract of sale, but leave it in full force; and he could retain possession, only until the rents and profits had discharged his lien, when chancery would compel a reconveyance; and a recovery even might be prevented by a bill to redeem.[8] (*z*)

[1] Per Dorsey, J., Pratt *v.* Van Wyck, 6 Gill & J., 498; acc. Eyler *v.* Crabbs, 2 Md. 137.
[2] Ibid.
[3] Slack *v.* McLagan, 15 Ill. 242.
[4] Walker *v.* Sedgwick, 8 Cal. 398.
[5] Bottorf *v.* Conner, 1 Blackf. 287.
[6] Green *v.* Fowler, 11 Gill & J. 103.
[7] Richardson *v.* Baker, 5 J. J. Marsh. 323.
[8] Haley *v.* Bennett, 5 Port. 452. And see Owen *v.* Moore, 14 Ala. 640.

(*z*) Under the Code of Indiana, in a suit on a note and to enforce a vendor's lien, a prior judgment on the note and a return of no personal property need not be alleged. But a judgment for a sale under the lien in the first instance is bad, unless it appear of record that the defendant has no personal property out of which the note can be satisfied by execution. Scott *v.* Crawford, 12 Ind. 410.

A person directed his solicitors to loan certain money for him on mortgage, after examining the title. After such examination, the plaintiff, one of them, advanced part of the money, and received the mortgage, but the defendant, the other, refused to complete the loan or advance the money to the mortgagor. The plaintiff brings a bill in equity to compel an assignment of the

13. The assignee of a bond, given for the price of part of a tract of land, failing to obtain payment from the purchaser, has no lien on the unpaid purchase-money in the hands of the grantee of the other part.[1]

14. It has been made a question, whether an equitable lien upon land can be maintained in favor of a vendor, who has himself never had a legal title, his vendee taking a title directly from the person of whom the vendor purchased.[2] But, where a vendee by parol sold in the same way, and the first vendor then gave a deed to the second vendee; held, he had a lien for the price.[3] And a vendor, conveying to purchasers from his vendee, and receiving payment from them, and partial payments from his vendee, still retains his lien upon the remainder of the land, for the balance of the purchase-money.[4] (*a*)

[1] Ragsdale *v.* Hagg, 9 Gratt. 409.
[2] Bayley *v.* Greenleaf, 7 Wheat. 50.
[3] Briscoe *v.* Bronaugh, 1 Tex. 326.
[4] Taylor *v.* Alloway, 3 Litt. 216; Marsh *v.* Turner, 4 Mis. 253.

---

mortgage to him. Held, the plaintiff was not bound to sue at law for his advances; that he alone had a lien on the mortgage, and the defendant, holding the legal title in trust for him, was bound to assign the mortgage to him; and that the case was one of equity jurisdiction. Mount *v.* Suydam, 4 Sandf. Ch. 399.

A. sells land to B., obtains judgment on the notes given him for the purchase-money, and levies on the lands in the possession of C., a purchaser from B.; and C. puts in his claim. Held, upon trial of the claim, A. cannot set up his lien as vendor, but must go into equity to establish it, and there obtain a decree that the land be sold. Colquitt *v.* Thomas, 8 Geo. 258.

Where a note given for the purchase of land is put in suit, the vendor's lien should properly be enforced in the same action; but a neglect to embrace both remedies in such action is not necessarily a waiver of the lien, either as to the vendee, or as to purchasers from him with notice, at any rate so long as the note is not barred; and a subsequent action to enforce the lien may be sustained, after execution and return of no property in the first suit. McAlpin *v.* Burnett, 19 Tex. 497.

(*a*) A., having title, executed a bond to B., who, having paid therefor, assigned the bond to C., who assigned to D., with notice of the non-payment of the purchase-money due from C. to B., and of the lien of the latter on the land. Held, B. had a lien. Ligon *v.* Alexander, 7 J. J. Marsh. 288.

It seems, in Indiana, a valid title to real estate may pass by a mere *agree-*

15. The doctrine of equitable lien does not apply to the assignment of a mortgage and the debt secured by it. The assignor has no such lien.[1] But the assignor of a bond for a title is held to have the same lien upon the land, as a vendor who conveys by deed.[2]

16. Where a grantee, in consideration of the conveyance, agrees to pay debts of the grantor, and support him and his daughters; the grantor has no lien to secure such support.[3] So, where A. conveys land to B., who, in consideration thereof, covenants with A. to support and maintain him and his lunatic son during their lives, and the life of the survivor; such covenant creates no lien in favor of either A. or his son; the covenant being substituted for the purchase-money, or a mode of payment of the price of the land.[4] So, where a

[1] Pratt *v.* Van Wyck, 6 Gill & J. 498.
[2] Wiseman *v.* Reid, 7 J. J. Marsh. 249.
[3] Brawley *v.* Catron, 8 Leigh, 522.
[4] McKillip *v.* McKillip, 8 Barb. 552.

---

ment, accompanied by delivery of possession. But, in such case, the vendor may reserve an express lien for the price.

Agreement under seal, to sell certain land and a steam-engine, the price to be paid in three years; the purchaser to have immediate possession of the land, and, after erecting a mill-house, to have the engine also, which was to remain on the land till payment of the price, when a title should be made. The vendee took possession of the land, built the house, and put the engine in operation. In September, 1821, the vendor assigned the agreement, and in July, 1824, the assignee re-assigned it to another person. In March, 1823, a judgment was recovered against the vendee, and the land sold on execution. The second assignee brings a bill in equity against the execution purchaser, claiming a lien upon, and praying a sale of the property, to satisfy the claim for the purchase-money. Held, the doctrine of implied lien was not applicable to this case; that the agreement not to remove the engine gave an express lien upon it, and the express covenant, that the vendor should retain his title till payment, created a lien upon the land; that the lien was assignable, and, after the first assignment, the vendor retained only a bare legal title, held in trust for the purposes of the contract; and that the defendant, having notice, took the estate subject to the same trust. A sale was decreed, with the proper injunction to the persons in possession, &c. Lagow *v.* Badollet, 1 Blackf. 416.

father conveyed to his son, taking back a bond for the support of himself and his wife for life, and a lease of part of the land for the same term; held, the grantor had no lien.[1] So a deed was made by a grandfather to his grandson, in consideration of love and affection and divers other good considerations, and with the purpose of disposing of the grandfather's property after his death, and securing a legacy to his son; and that he in the mean time might retain control of the land so far as to secure a support. For this purpose, the grandfather took back a life lease at a nominal rent, and a bond conditioned (virtually) that, whenever the grandson neglected to provide a support for him, he might resume possession or claim rent. Held, these facts showed, that the vendor did not rely upon any implied lien, but carved out his own security for his support by a direct incumbrance upon the land; and that this express lien for a part of the consideration negatived the right of any implied lien for the residue.[2] So A. grants to B. real and personal estate, in consideration of money paid, and of an annuity for the life of A. if she should survive B.; and in the same deed B. covenants that his estate shall pay the annuity. Held, that this transaction does not create a charge on the estate for payment of the annuity, nor a vendor's lien.[3]

17. The doctrine applies to forced sales, by operation of law, as well as to those made by the voluntary act of the owner. It is said by the Court in Maryland, "No reason occurs to us why it should not apply equally to a forced sale under the law, as to a voluntary conveyance by the party himself. Indeed, the reason is stronger for maintaining it in the former case than in the latter. In voluntary sales, the vendor might perhaps be left to suffer the consequences of his own want of caution without just ground of complaint. But this cannot be affirmed, where he is deprived of his property against his will by the strong arm of the law, under the stern plea of State necessity." Thus,

[1] Meigs *v.* Dimock, 6 Conn. 458.
[2] Fish *v.* Howland, 1 Paige, 20.
[3] McCandlish *v.* Keen, 13 Gratt. 615.

a railroad corporation being authorized by their charter to take lands for the use of the road, and not able to agree with the plaintiff, an owner of land, upon the price to be paid him; commissioners awarded the amount, which was tendered but refused. The plaintiff afterwards sued the contractors of the road for trespass, but, failing in such suit, received a certificate of deposit for the amount awarded by the commissioners; the company, however, at that time being utterly and notoriously insolvent, and no deposit being actually made. The road was afterwards sold under a decree in chancery to the defendants, the plaintiff not being party to the proceedings, and his agent giving notice at the time and place of sale, that the plaintiff would claim a lien on the land seized for the price awarded. Upon a bill to enforce such lien, by a sale of land, held the plaintiff was entitled to a decree.[1] But commissioners appointed by the Court to sell land, who sell it, and take a note of the purchaser for a part of the price, cannot file a bill to have the land sold to pay such note.[2]

18. Where a conveyance was made, which was intended as a trust, but on the face of it appeared to be a purchase, and, the trust not being in writing, the party lost his estate: held, he still had a lien for the purchase-money stated in the deed.[3]

19. Where a husband completed a contract of purchase entered into by the wife before marriage: held, his assignee had a lien for the purchase-money, and interest, and lasting improvements, from the time of completing the contract, he accounting for the rents and profits from that time.[4]

20. The question has often arisen, against what parties, claiming an interest in the land, the lien of the vendor for the purchase-money may be enforced. Such lien is said to be valid against the purchaser, his heirs, &c., and widow, and all subsequent purchasers from him without considera-

[1] Mims *v.* Macon, &c. 3 Kelly, 342.
[2] West *v.* Thornburgh, 6 Blackf. 542.
[3] Leman *v.* Whitley, 4 Russ. 423.
[4] Neeson *v.* Clarkson, 4 Hare, 97.

tion or with notice, devisees, purchasers under a sale for payment of debts after the vendee's death,[1] holders of subsequent general liens, and, it seems, an execution purchaser.[2] (*b*) So, also, against a mechanic's lien acquired before the deed, although the vendee had possession and had given notes for the price.[3] Or against a conveyance to secure a preëxisting debt, though the creditor have no notice of the lien; a *bonâ fide* purchaser being one, who, at the time of purchase, advances some new consideration, surrenders some security, or does some other act, which, if his purchase were set aside, would leave him in a worse than his original position.[4] So against an assignee for benefit of creditors.[5] But not against creditors holding under a *bonâ fide* conveyance, or subsequent purchasers, or mortgagees, without notice, or a *bonâ fide* purchaser from a fraudulent purchaser. (*c*)

[1] White *v.* Casanave, 1 Har. & J. 106.
[2] Kilpatrick *v.* Kilpatrick, 23 Miss. 124.
[3] Neil *v.* Kinney, 10 Ohio St. 67.
[4] Hoggatt *v.* Wade, 10 Sm. & M. 143; Chance *v.* McWhorter, 26 Geo. 315.
[5] Warren *v.* Fenn, 28 Barb. 333.

(*b*) When, in founding a city, certain lots are reserved and dedicated by the founder to particular public purposes, and the donees fail or refuse to accept the same, these lots revert to the grantor, and his vendor may enforce his lien for the unpaid purchase-money, as the lien has never been detached. Still *v.* Griffin, 27 Geo. 502.

(*c*) More especially, a vendor cannot enforce his lien against subsequent purchasers without notice, for a sufficient consideration, and who purchased of the vendee after he had been in quiet possession for more than twenty years. Ewing *v.* Beauchamp, 6 B. Mon. 422.

A. sold land to B., executed his bond for title, and afterwards died. The Probate Court, upon application of B. before payment of the purchase-money, directed the administrator to convey to B. He did so, and afterwards brought an action against B. for the purchase-money, recovered judgment, and levied upon the land, which was bought by C., and by him sold to D. Held, the administrator had no lien. Boon *v.* Barnes, 23 Miss. 136.

Though a purchaser with notice from one without notice takes the latter's rights, yet if, confederating with the original vendee, he has procured the purchase, under a foreclosure sale, to be made by the innocent purchaser, intending to purchase from him and to defeat the vendor's lien, he shall take nothing by his fraud. Chance *v.* McWhorter, 26 Geo. 315.

Where a settler upon the public lands of the United States, under a pre-

21. Notice is sufficient to charge a purchaser, if received at any time before payment of the price.[1] Or if it is merely

[1] 4 Kent, 151–153; 2 Story, 461–471; Hallock *v.* Smith, 3 Barb. 267; Eskridge *v.* McClure, 2 Yerg. 84; Magruder *v.* Peter, 11 G. & Johns. 218; Graves *v.* McCall, 1 Call, 414; Handley *v.* Lyons, 5 Munf. 342; Duval *v.* Bibb, 4 Hen. & M. 113; Stewart *v.* Ives, 1 Sm. & M. 197; Webb *v.* Robinson, 14 Geo. 216; McKnight *v.* Brady, 2 Mis. 110; Patterson *v.* Johnston, 7 Ham. 225; 23 Miss. 136. See Lincoln *v.* Purcell, 2 Head, 143; Collier *v.* Harkness, 26 Geo. 362; M'Alpin *v.* Burnett, 23 Tex. 649; Taylor *v.* Hunter, 5 Humph. 569; Owen *v.* Moore, 14 Ala. 640; Shall *v.* Biscoe, 18 Ark. 142; Burlingame *v.* Robbins, 21 Barb. 327; M'Brayer *v.* Collins, 18 B. Mon. 833; Mims *v.* Lockett, 23 Geo. 237.

---

emption right, sells his land, and his grantee sells it again, subject to the original vendor's claim for the purchase-money, which the second grantee assumes; the original vendor has a lien for such purchase-money, which he may enforce in equity against the second grantee, even after the latter has taken out a patent to the land in his own name, under a subsequent pre-emption law. Thredgill *v.* Pintard, 12 How. U. S. 24.

Bill to enforce a lien against three persons, alleging a sale to two of them, who gave their notes for the price, one payable to the plaintiff's wife, for release of dower; a conveyance made to one in trust for him and the other; an express agreement that the notes should be a lien; and a purchase by the third defendant from the plaintiff's grantee, with notice. The answers of the two alleged vendees denied such trust, and such agreement for a lien, and alleged a conveyance to the grantee alone, on condition that the other alleged joint purchaser should sign the notes as surety. The third defendant admitted his purchase, and notice of the non-payment of part of the price; but alleged, that he ascertained the notes were signed by the second joint purchaser as surety, and were not therefore a lien, and that he had paid all the price. Held, there was no sufficient evidence of the alleged trust, or of an express lien; and the bill was dismissed. Way *v.* Patty, 1 Smith, 44.

A purchaser, not having paid for the land, conveyed it, taking back two mortgages, of equal date, for parts of the consideration; with the intention that one of them should be assigned to the original vendor, as security for the original purchase-money, and have priority, according to the agreement between them. The mortgages were simultaneously recorded, but the one designed for the original vendor was first assigned to him, and afterwards the other was assigned to another person *bonâ fide*, and for full value. Held, this assignee took his mortgage, subject to the original vendor's equity against his vendee; that the statute of registry had no application to the respective titles of the two assignees; that the first purchaser took the vendor's mortgage as trustee for him; that the principle, by which a lien is waived by the

constructive.[1] Or such notice as ought to put him upon inquiry.[2] Or if given to an agent.[3] Or a solicitor.[4] (*d*)

[1] Tiernan *v.* Shurman, 14 B. Mon. 377.
[2] Briscoe *v.* Bronaugh, 1 Tex. 326; Frail *v.* Ellis, 17 Eng. Law & Eq. 457.
[3] Maunce *v.* Byars, 11 Geo. 180.
[4] Frail *v.* Ellis, 17 Eng. Law & Eq. 457.

---

taking of collateral personal security from a third person, did not apply, the mortgagor being the real vendee, and the mortgage upon the land itself; that the implied waiver of a lien (it seems) can be set up only by purchasers without notice; and that the title of the vendor should prevail. Stafford *v.* Van Rensselaer, 9 Cow. 316; Van Rensselaer *v.* Stafford, 1 Hopk. 569.

D., the vendee of two tracts of land, part of the original purchase-money for which remained unpaid, sold one tract to A., with notice that this balance was still due. On appeal by A., from a decree ordering the sale of both tracts, for cash, to satisfy the original vendor's lien; it was held, that such balance was properly regarded as a lien on both tracts, that A. had a right to insist on the original vendor's coming upon the tract remaining in D.'s hands, and to insist that the proceeds of its sale should first be applied in discharge of the lien, before any resort should be had to the tract purchased by him, and that a sale should be decreed for reasonable credit, and not for cash. Alford *v.* Helms, 6 Gratt. 90.

(*d*) And notice may be given *by* as well as *to* an attorney. Thus a testator devised his real estates to A. in fee, charged with his debts. A., in 1811, contracted with C. to sell part of the real estate, the purchase-money to be paid two months after. C. was immediately let into possession. The purchase-money was not paid. In January, 1812, A. was declared a bankrupt. In October, in the same year, C. contracted to sell part of the same real estate to E., who was let into possession, but his purchase-money was not paid. C. made his will in 1817, by which he devised his real and personal estate to trustees upon trust to pay his debts, and then upon trust for his children, and died in 1827. The trustees refused to act, and the widow of C. and her children filed a bill for the appointment of trustees, and in that suit F. and G. were appointed new trustees. In 1834, the attorney for F. and G. gave notice to the assignees of A., that the purchase-money for the property comprised in the contract of 1811, and interest or rent in respect of the land, were ready to be paid, for the express purpose of completing the agreement. In 1844, the money not having been paid, the assignees filed a bill against F. and G., the trustees of the will of C., and against the parties beneficially interested thereunder, and against E., the sub-purchaser, and others, praying a declaration that the plaintiff had a lien on the estate for the unpaid purchase-money. Held, the notice from the attorney for F.

And knowledge that part of the price is unpaid, though not how much, or how secured, is sufficient to put a purchaser on inquiry.[1] (*e*) So if the purchaser might know of the lien by examining the first vendee's title-deed, he is chargeable with notice.[2] So, if the vendor remain in possession, the purchaser is bound to inquire into the title; more especially if the vendor has not actually conveyed, even though he had notice of the proposed transfer and failed to disclose his lien.[3] A recital that the consideration remains unpaid has been held insufficient notice.[4] Though the vendor cannot claim a larger sum.[5] (*f*) So where the deeds, constituting the chain

[1] Manly *v.* Slason, 21 Verm. 271.
[2] Honore *v.* Bakewell, 6 B. Mon. 67.
[3] Hopkins *v.* Garrard, 7 B. Mon. 312; Dyer *v.* Morton, 4 Scam. 146.
[4] 7 B. Mon. 312; Thornton *v.* Knox, 6 Ibid. 74; Woodward *v.* Woodward, 7 Ibid. 116.
[5] Kilpatrick *v.* Kilpatrick, 23 Miss. 124.

---

and G. was an acknowledgment in writing within the meaning of the 40th section of the statute 3 & 4 Will. IV. c. 27; that a person by whom "the money is payable," means, in the case of a claim by equitable lien, the person entitled to the land on which the charge is sought to be fixed; and that this acknowledgment, being by devisees in trust for payment of debts, was good as against the *cestui que trust* under the same will. Toft *v.* Stephenson, 9 Eng. Law & Eq. 80.

There being no proof as against the *cestui que trust* that the attorney who wrote the notice was in fact the agent of the devisees in trust, the Court granted an inquiry. Ibid.

(*e*) In Kentucky, under Rev. Sts. c. 80, § 26, a vendor has no lien against a purchaser of the vendee, unless it is expressly stated in the deed what part of the consideration remains unpaid; even notwithstanding notice, that a portion of the purchase-money remains unpaid. Chapman *v.* Stockwell, 18 B. Mon. 650.

(*f*) An administrator's deed showed that the land had belonged to his intestate, and was sold by order of Court, and that part of the price had not become due. Held, a purchaser was justly chargeable with notice of a lien for the price. Hoggatt *v.* Wade, 10 Sm. & M. 143.

A bill to enforce the lien of a vendor alleged, that the deed set forth a description of the bills given for the consideration, and by whom they were drawn and indorsed, but also alleged, that such description was given in order to give notice that the price was unpaid, and to retain the vendor's lien. Held, the bill was not bad on demurrer. Campbell *v.* Baldwin, 2 Humph. 248.

A writing at the foot of a deed, signed by one of the grantees, stating that

of title under which the last purchaser holds, show that the purchase-money has not been paid, it will be held to be notice of the lien. Though in such cases the burden of proof rests upon the party proving the lien.[1] And the lien need not be recorded, and is not within the registration acts.[2] So the lien exists, although the vendee be solvent.[3] So the original vendor, on a resale of the land, may look to the land and not the proceeds for his payment, especially if he gives notice of his lien. The lien of the vendor is on the whole and every part of the land, whether the vendee has been evicted by

[1] McAlpin *v.* Burnett, 23 Tex. 649.
[2] 1 Tex. 326.
[3] Pierson *v.* David, 1 Clarke, (Iowa,) 23.

---

one instalment of the purchase-money, recited in the deed to have been paid, still remained unpaid, is notice to a purchaser of the grantees, of the lien of the grantor, though the lien has not been recorded. Scott *v.* McCullock, 13 Miss. 13.

The plaintiff purchased land, but took no conveyance. He afterwards sold it, and his grantee, still owing part of the price, conveyed the land, with general warranty, but referring to the agreement with the plaintiff, to trustees for the benefit of creditors. The plaintiff then brought a suit against the heirs of his grantor to obtain the title, and a decree was made, appointing a commissioner to convey to the plaintiff; but the commissioner, by the direction of the plaintiff, conveyed to the purchaser from the plaintiff. The trustees then sold the land, and the plaintiff files a bill to subject it for the balance of the purchase-money due him from his vendee, being insolvent. The trustees and purchaser from them denied having notice that the purchase-money was due, at the time of conveyance to the trustees, and there was no proof of notice. Held, the land was liable for the purchase-money due the plaintiff. Beirne *v.* Campbell, 4 Gratt. 125.

A purchaser of land paid $1,000, and gave a bond for $2,000, payable in two years, and containing a memorandum below the seal, that the land should be liable for the $2,000 till paid. The obligee assigned the bond, but a few days previously the purchaser conveyed the land to one who had loaned him $1,200, taking back a bond of defeasance. The sub-purchaser had notice of the bond first mentioned, and of its indorsement. The assignee of the bond brings a bill in equity against the obligor, praying a sale of the land. Held, the sub-purchaser, having notice, was chargeable with the lien; and, on a similar principle, the plaintiff should have the benefit of it; that an equitable lien was assignable, as well as a legal mortgage. Decreed, that the plaintiff should recover the sum due, or, if not paid in a certain time, the land to be sold. Eskridge *v.* McClure, 2 Yerg. 84.

title paramount from a portion or not; though the amount must be reduced proportionately to the loss.[1]

22. In a suit, brought by an assignee of the note made to the vendor for the purchase-money, to enforce the lien against a purchaser with notice, it is no defence, that the original vendor had not a good title at the time appointed for a conveyance, the contract being unrescinded, and a title having been obtained and tendered by him before the suit was commenced.[2]

23. Where a vendor has a lien, and his vendee sells part of the land without disclosing the lien, the second vendee may compel the first vendor to enforce his lien on the residue of the land, or else to proceed at once in the collection of his debt.[3] (See § 26.)

23 *a*. A vendor, like a mortgagee, may lose his lien by any concealment or misrepresentation, through which a third person is induced to purchase the land, as unincumbered.[4] But the lien of the first grantee, who himself sells the land, will not be affected by representations of the grantor to a subsequent purchaser, that he will take an unincumbered title.[5]

24. The general rule, that a vendor has a lien against subsequent purchasers having notice, so far as it relates to actual notice of the lien, properly applies, where the vendor has parted with his title, and not where the vendee simply holds a bond for a deed, upon full payment of the purchase-money. In the latter case, a purchaser cannot ordinarily be regarded as a *bonâ fide* purchaser without notice; because he might have known of the lien by examining the title of his vendor. All the incidents of a mortgage, so far as the lien is concerned, attach to the contract of sale.[6]

25. If a grantee sell the land to another person, who has no notice that he has not paid the purchase-money, and take from the purchaser a note for the purchase-money, which

[1] Mims *v.* Lockett, 23 Geo. 237.
[2] Brumfield *v.* Palmer, 7 Blackf. 227.
[3] Ammerman *v.* Jennings, 12 B. Mon. 135.
[4] See ch. 21; Burns *v.* Taylor, 23 Ala. 255.
[5] Rowland *v.* Day, 17 Ala. 681.
[6] Amory *v.* Reilly, 9 Ind. 490; acc. Bradford *v.* Harper, 25 Ala. 337. See M'Brayer *v.* Collins, 18 B. Mon. 833.

is assigned for a valuable consideration by the vendee, before the sub-vendee or the assignee has notice that the original vendor has not been paid; the equitable lien of the latter will be lost, and the assignee will be entitled to the money due on the note. So, although the sub-vendee, after he was informed of the non-payment by his immediate vendor, said he would not pay his note unless he was made safe; and though the assignee gave the maker of the note an indemnity to induce him to pay it.[1]

26. If a vendee conveys different parcels of land, bound by the vendor's lien, to several *bonâ fide* purchasers at several times; as between such purchasers, the lands are chargeable in equity for the original purchase-money in the inverse order of their alienation. (See § 23.) Thus a vendee sold one lot to a *bonâ fide* purchaser for value, and subsequently conveyed another lot in trust to secure a creditor. The latter was sold under the trust and purchased by the creditor, who afterwards purchased of the original vendor the vendee's notes for the original purchase-money. Held, such creditor had no claim on the owner of the first lot for a proportionate contribution to the amount of the notes.[2]

27. *The death of the vendee* does not defeat the lien of the vendor for the purchase-money of the estate; and this, although by the laws of the State in which the land is situated, as is universally the case in the United States, lands are by express statutory provision made liable for the debts of one deceased upon a deficiency of personal property. It is said, the heir cannot be permitted to hold what his ancestor unconscientiously obtained. And, after recovering a judgment at law against the administrator of the vendee upon a note given for the purchase-money; upon a deficiency of personal estate, the vendor may have a decree in Chancery to have the estate sold.[3] So, although the ven-

[1] Houston *v.* Stanton, 11 Ala. 412.

[2] Wright *v.* Atkinson, 3 Sneed, 585; Crafts *v.* Aspinwall, 2 Comst. 291.

[3] Garson *v.* Green, 1 Johns. Ch. 308; Eskridge *v.* McClure, 2 Yerg. 84; Hughes *v.* Kearney, 1 Sch. & Lef. 132; White *v.* Casanane, 1 Har. & J. 106, 1 B. Mon. 257; Carr *v.* Hobbs, 11 Md. 285; Pintard *v.* Goodloe, 1 Hemp. 502; Cahoon *v.* Robinson, 6 Cal. 225; Shall *v.* Biscoe, 18 Ark. 142; Pounds *v.* Gastman, 29 Miss. 133; Delassus *v.* Poston, 21 Mis. 543; Fisher *v.* Johnson, 5 Ind. 492; Bisland *v.* Hewitt, 11 S. & M. 164.

dors had the notes for the purchase-money allowed against the estate of the vendee after his death, they may still resort to the land for payment of the balance.[1] So although, having the legal title, they requested the administrator to procure a sale of the vendee's interest; if such interest was bought with notice of the lien.[2]

28. The widow's right of dower has also been held subject to the vendor's lien for the purchase-money; more especially where there has been only a bond for a deed,[3] or a lien is expressly reserved. (*g*) Thus land was sold and a part of the price paid, the vendor giving bond to convey upon payment of the balance. The purchaser having died, held, his widow's right of dower was subject to the vendor's right of having the land sold for payment of such balance; and that the purchaser, at such sale, under a decree in equity, took a title clear of the claim of dower, the widow being entitled, however, to one third of the surplus proceeds for her life.[4] So, in the case of Nazareth, &c. *v.* Lowe,[5] one Kelly bought a lot of land for a certain price, payable at a future time. Subsequently, the vendor conveyed to him, reserving in the deed a lien for the consideration, no part of which was paid. Held, after his death, his widow's right of dower was subject to this lien. Robertson, C. J., says:[6] — "The lien was coeval with the inception of Kelly's equitable right to the lot. Kelly acquired the equity subject to that lien, and his wife's initiate right of dower could not have been better or greater than her husband's original right to the lot. The title and the lien being connate, there never was any right in Kelly or his wife, unincumbered by the lien; and the conveyance to Kelly hav-

[1] Delassus *v.* Poston, 19 Mis. 425.
[2] Ibid.
[3] Crane *v.* Palmer, 8 Blackf. 120; Fisher *v.* Johnson, 5 Ind. 492.
[4] Williams *v.* Woods, 1 Humph. 408; Bisland *v.* Hewett, 11 S. & M. 164.
[5] 1 B. Mon. 257.
[6] Ibid. 258.

(*g*) Where a right of dower in land is subordinate to the seller's lien for unpaid purchase-money, the widow may compromise for it by parol. Malin *v.* Coult, 4 Ind. 535.

ing expressly reserved the lien, his legal right, and that of course also of his wife, were subject to that incumbrance, just as their equitable rights had always been. Her claim to dower is posterior, in fact and in law, to the reserved lien for the original consideration." So, where land of a deceased person is sold, as incapable of division, and purchased by one of his children, who gives bond for the purchase-money, but never procures a conveyance, the widow of the purchaser cannot be endowed to the prejudice of the other children, who retained a lien on the land for their share of the purchase-money.[1]

29. Upon the same principle, as bearing upon the relation of husband and wife, where land was purchased by a husband with money bequeathed to his wife, it was held, that the vendor had a lien on the land for his purchase-money, whether it was bought for the separate use of the wife or not.[2] So where the deed is made directly to the wife, she is not regarded as a *purchaser*, but a mere volunteer, subject to the vendor's lien.[3] So the purchaser of land gave back a note and mortgage for part of the price, which were assigned. The assignee afterwards made a loan to the mortgagor, taking from him another note, and a new mortgage of the land with other land, and discharging and cancelling the old mortgage. In a suit to foreclose, the wife of the mortgagor *intervened* for a homestead. Held, her claim was subject to the claim for the balance of the purchase-money, with interest, but should have priority of the other portion of the assignee's demand. The taking of the new mortgage was regarded as indicative of an intention to hold the land as security for the balance of the price.[4] (*h*)

[1] Miller *v.* Stump, 3 Gill, 304.
[2] Lynam *v.* Green, 9 B. Mon. 363.
[3] Upshaw *v.* Hargrove, 6 Sm. & M. 286.
[4] Dillon *v.* Byrne, 5 Cal. 455.

(*h*) In reference to the right of homestead, — a privilege somewhat analogous to that of dower, — it is held, that land on which there is a vendor's lien may become a homestead, subject to that lien exactly as it exists; therefore in such a case the husband cannot bind it by a new contract as to interest on the price unpaid. McHendry *v.* Reilly, 13 Cal. 75.

30. It has generally been held, that the lien of a vendor for the purchase-money of the land shall not prevail over the claims of *the vendee's creditors.*[1] The leading case upon this subject is Bayley *v.* Greenleaf. The forcible remarks of Chief Justice Marshall, in that case, applying to the whole subject now under consideration, but more especially to this particular point, have been already cited, (§ 8.) The facts of the case were as follows: — In 1792, a person purchased land, and sold it to one of the defendants, who took his title from the first vendor, giving the second vendor a bond for the price. In March, 1796, this bond was surrendered, upon the obligor's accepting bills for the amount, some of which were never paid. In September, 1796, the second purchaser conveyed the land, with other lands, in trust for one who was a surety for him, and to secure him for future advances and liabilities. In March, 1797, the trustee conveyed to the other defendants, in trust, for the purposes mentioned in the deed to the trustee. In June, 1797, the second purchaser, with two others, conveyed the land, with other lands, to the other defendants, for payment of their debts. Some doubt arising concerning the registration of these deeds, the latter defendants brought a suit against the second purchaser, and recovered judgment, and the land was bought upon execution for them, and afterwards conveyed to them upon the former trusts. Both the first and second purchasers had become insolvent, and been discharged in bankruptcy or insolvency. The first purchaser, and a trustee for his creditors, bring a bill in equity against the defendants, to subject the land to payment of the original purchase-money. One of the defendants, the trustee above named, alleged that he had contracted to sell the land to the other, but, the price not being paid, that he still retained the title. Held, the plaintiff's lien should not prevail over the claim of the trustee on behalf of

[1] 7 Wheat. 46; see Aldridge *v.* Dunn, 7 Blackf. 249; Taylor *v.* Baldwin, 10 Barb. 626; Webb *v.* Robinson, 14 Geo. 216. But see Lewis *v.* Caperton, 8 Gratt. 148.

creditors.[1] So in Gann *v.* Chester,[2] it was held that a vendor cannot assert his lien against other creditors. Catron, C. J., says:[3] — "In Tennessee, our uniform policy has been to permit the most unrestrained alienation of lands, and to hold them liable for the payment of debts, the same as personal property. No lien exists on the slave or other personal property, for unpaid purchase-money; and the rule that the vendor of land has such lien, was adopted from the British courts, grounded on a policy in reference to the liability of real estate, essentially dissimilar to ours. By our statutes, where a regular mortgage is taken, and the lien created in the most formal manner, if it be not registered in the time prescribed, it does not affect the creditors of the mortgagor. They may seize and sell the estate. It would be most inconsistent to say, that a secret lien for unpaid purchase-money could be set up, ten years after the vendee had been in the visible occupancy and ownership. The attempt to enforce the lien against the creditor's legal title, is now made for the first time in this State. That the like has been done in any American court, we are not informed." The learned Judge adds, the case of Bayley *v.* Greenleaf "meets the decided and unanimous approbation of this Court."[4] (*i*)

[1] Bayley *v.* Greenleaf, 7 Wheat. 46.
[2] 5 Yerg. 205; acc. Roberts *v.* Rose, 2 Humph. 147.
[3] Ibid. 207.
[4] Ibid.

(*i*) These decisions are sustained by the following English case, in which some apparently contradictory authorities are examined, and held not to be really inconsistent with the doctrine as above stated.

In Fawell *v.* Heelis, (Ambl. 724,) it was held, that where the vendor takes a bond for the price, he has no lien against the vendee's creditors, for whose benefit the estate has been assigned. Lord Apsley, Chancellor, says (Ibid. 726): "Q. Whether plaintiff has an equitable lien against the creditors. It was laid down as a general rule, that the seller has such a right, not only against the purchaser, but against his creditors. Three cases cited. Chapman *v.* Tanner, 1 Vern. 267; according to the report it is in point; but it appears by the Register's book that the seller was to keep the title-deeds till he was paid. The Court said, that a natural equity arose from his having the deeds in his custody. Polixfen *v.* Moore, 3 Atk. 272, very inaccu-

31. But, contrary to this general doctrine, sustained by the authorities cited in the last note, where land was sold by parol, the vendor retaining the title-deeds, and the vendee took possession, and commenced building a house, the vendor was held entitled to the consideration-money against the lien creditors.[1] So, in distributing the proceeds of a sheriff's sale, a lien for the balance of the purchase-money, subject to which the land was conveyed to the defendant, was allowed priority over subsequent judgment-creditors.[2] So A. sold land to B., and retained the title as security for the purchase-money, and a balance remained unpaid. Judgment was rendered, and execution issued, against B.; and the land purchased from A. was levied upon. After the execution was returned, and before a *venditioni exponas* was issued, B. paid the balance of the purchase-money. Held, B.'s interest in the land, before he paid the balance of the purchase-money, could not be sold under execution, neither could land, to which he acquired title after the return of the execution, be sold under the *venditioni exponas*.[3]

32. And the vendor's lien will prevail against a voluntary

[1] Kline *v.* Lewis, 1 Ashm. 31.
[2] Barnitz *v.* Smith, 1 W. & S. 142.
[3] Badham *v.* Cox, 11 Ired. 456.

---

rately reported. J. P. seised in fee, after the death of his mother, of Orchard's farm, agreed to sell for £1,200, and delivered possession to Moore; afterwards P. let the farm, and received the rents; but by reason that the purchase-money was not paid, he kept the title-deeds. Bill, to have the purchase completed, he offering to account for the rents, and to deliver up the deeds. The question in the cause was, How to secure the legatee. Fordiff *v.* Scrugham, 8th December, 1769, before Lord Camden. The decree is right, but did not proceed on this notion of equitable lien upon the estate. In this case it does not appear that it was the intention of the parties, that the vendor should have such a lien, but a receipt taken for the consideration-money, on the back of the deed, and the bond was accepted as a satisfaction for the purchase-money. If the vendor parts with his estate, and takes a security for the consideration-money, there is no reason for a court of equity to assist him against the creditors of the purchaser. Dismiss the bill."

conveyance, made by the vendee, in trust for the benefit of his creditors, in consideration of preëxisting debts; where a bill has been brought to enforce such lien, before the creditors have signified their acceptance of the assignment, by some distinct affirmative act, indicating their election to claim or take benefit under the deed.[1] Thus a father conveyed to his son, but remained in possession of the land. About a year afterwards, he entered into a written agreement with the son, that the father should retain and improve the land during his life, at a nominal rent, with a provision for his widow, if she should survive him; the son agreeing to execute his bonds to his brothers and sisters for four fifths of the value of the land, to become due after the father's death, being for the balance of the purchase-money. The son executed the bonds, and the father remained in possession till the son became insolvent, and conveyed the land to trustees for benefit of creditors. The agreement was not acknowledged or recorded. The father and the obligees file a bill to prevent a sale, pending which the father dies. Held, there was lien on the land for payment of the bonds from the proceeds of the land, as against the son, trustees, and judgment and general creditors.[2]

33. It is stated as the general rule, that, in order to give a vendor a lien on the land, there must be a debt for unpaid purchase-money, to a fixed amount, *due directly to the vendor*.[3] But still the lien may often be enforced by, as well as against, other parties than those originally concerned in the sale. Thus, where the original vendor *has died*, an agreement of doubtful import between one of his executors and a second purchaser, the first vendee being insolvent, will not have the effect of discharging the vendor's lien. Any agreement of this nature would not so operate even against the party making it, and still less against his co-executor.[4] So, as will be seen hereafter, (*infra*, § 37,) in many of the cases where the question of *waiver* of the vendor's lien has arisen,

[1] Green *v.* Demoss, 10 Humph. 371.
[2] Repp *v.* Repp, 12 Gill & J. 341.
[3] Patterson *v.* Edwards, 29 Miss. 67.
[4] Stuart *v.* Abbott, 9 Gratt. 252.

the claim has been made by *an assignee* of the security taken for the purchase-money. And the same right has been allowed in favor of parties, claiming, not by express assignment, but by mere *equitable substitution.* Thus, where *sureties* were bound for the price of land sold, and had filed a bill for the sale of it to pay the debt, the purchaser having died insolvent, and pending the suit had paid the debt; held, they should be presumed to have paid with an understanding that they should be substituted to the lien of the vendor; and, though the land had been repeatedly sold after the original sale, as the lien of the first vendor was an elder equity than that of either of the subsequent purchasers, it should prevail over them; they having neither paid a consideration, nor taken deeds.[1] So where a purchaser discharges the lien, equity will substitute him in place of the vendor, as against another incumbrancer.[2] Thus a judgment attaches on land subsequently purchased by the debtor, subject to the vendor's lien; and a third party, who pays off the lien, is entitled, as against the judgment creditor, to be subrogated to the vendor's rights and equities.[3] So, where A. purchased land of B., but paid no part of the purchase-money, and he afterwards releases his title to C., on his paying the purchase-money, C., as to the right of A.'s widow to dower, is subrogated to the rights of B.[4]

34. But where one of joint purchasers discharges the lien, he will not in all cases be substituted to the lien of the vendor.[5] So one person cannot acquire a lien upon land purchased by another under an executory contract, by an *unauthorized* payment of the purchase-money.[6] And it has been held, that, where a vendor gives a deed and takes the note of the vendee, indorsed by a third person, the indorser is not entitled to have the land set aside for the payment of the purchase-money, where he has not made it.[7] So if the land

[1] Kleiser *v.* Scott, 6 Dana, 138; Ghiselin *v.* Fergus, 4 Har. & J. 522. But see Foster *v.* Trustees, &c. 3 Ala. 302.

[2] Planters', &c. *v.* Dodson, 9 Sm. & M. 527.

[3] Peet *v.* Beers, 4 Ind. 46.

[4] Fisher *v.* Johnson, 5 Ind. 492.

[5] Glasscock *v.* Glasscock, 17 Tex. 480.

[6] Truesdell *v.* Callaway, 6 Mis. 605.

[7] Bradford *v.* Marvin, 2 Flor. 463.

is sold to one person, and the price received from another, who takes the note of the former therefor, the latter has no lien.[1] So, where one of two joint purchasers died, and the other paid the whole price, and a conveyance was made to him and the heirs of the deceased in common; held, there was no lien on the share held by the heirs.[2] So a third party, who advances money to a purchaser to enable him to buy lands, cannot claim the benefit of the vendor's lien.[3]

35. The lien may be set up both by and against the original parties to the conveyance. Thus, upon a bill in equity to foreclose a mortgage, pending the bill, other parties were brought in as defendants, and in their answers, which they made cross-bills, alleged that the land mortgaged was conveyed to the original defendant, by a deed which recited payment of the purchase-money, when in fact a credit was given, and the notes for the price had never been paid, but had been assigned to them, thus giving them the lien of the vendor, in preference to the plaintiff's mortgage. The plaintiff alleged in reply, that the notes were given upon a joint sale of the land and a stock of merchandise; that he was a purchaser for valuable consideration, without notice; and that the purchase-money remained unpaid when he took his mortgage. Held, it not appearing what portion of the notes were given for the land, no decree could be made to establish the alleged lien; and, the mortgagee being ignorant when he took his mortgage, that the purchase-money was unpaid, and the deed alleging it to be paid, the lien was invalid against him.[4]

36. The lien of a vendor is held a proper subject of *mortgage;* and a purchaser under a decree of foreclosure acquires all the vendor's title, as against him and the mortgagee.[5]

37. It may have been gathered from many of the authorities already cited, and more particularly from the series of cases collected in Fish *v.* Howland, that the question of a

[1] Skaggs *v.* Nelson, 25 Miss. 88.
[2] Crane *v.* Caldwell, 14 Ill. 468.
[3] Stansell *v.* Roberts, 13 Ohio, 148.
[4] Growning *v.* Behn, 10 B. Mon. 383.
[5] Trammell *v.* Simmons, 17 Ala. 411.

vendor's lien has generally arisen, not from a denial of the general doctrine, but only of its application to the particular case under consideration, in consequence of an alleged *waiver* of the lien by some act of the party claiming it.[1] In reference to this particular branch of the subject, the cases will be found peculiarly uncertain and inconsistent. (*j*) So far as any settled rule can be deduced from them, it may be stated as follows: The law presumes an intention to retain a lien, and imposes upon the vendee the burden of proving the contrary. As evidence of such contrary intention, it was once held, and such seems to have been the rule of the civil law, that the lien is defeated by the giving of an express and distinct security for the purchase-money, such as a bond or note;[2] but it seems to be now well settled, that, in order to discharge the lien, the vendor must take *collateral security*, either in property or the engagement of some third person. Thus a receipt upon the deed for the price does not destroy the lien, being not conclusive evidence of payment; nor accompanying personal security;[3] more especially where the vendor remains in possession under a parol agreement that he shall do so until payment.[4] Or where there has been

[1] See Coote, 266.

[2] See Wagham *v.* Coomes, 14 Ohio, 428; Williams *v.* Roberts, 5, 35; Follett *v.* Reese, 20, 548; Shall *v.* Biscoe, 18 Ark. 142.

[3] 1 Hill, R. P. 474, 475; Honore *v.* Bakewell, 6 B. Mon. 67; Thornton *v.* Knox, Ib. 74; Palmer, 1 Doug. (Mich.) 422; Campbell *v.* Baldwin, 2 Humph. 248; Clower *v.* Rawlings, 9 Sm. & M. 122; Johnson *v.* Sugg, 13 Ibid. 346; Manly *v.* Slason, 21 Verm. 271; White *v.* Dougherty, Mart. & Y. 309; Roon *v.* Murphy, 6 Blackf. 272; Howlett *v.* Thompson, 1 Ired. Eq. 369; Halleck *v.* Smith, 3 Barb. 267; Sears *v.* Smith, 2 Mich. 243; Vail *v.* Foster, 4 Comst. 312; Pinchain *v.* Collard, 13 Tex. 333; Salmon *v.* Hoffman, 2 Cal. 138; Truebody *v.* Jacobson, Ibid. 269; Walker *v.* Sedgwick, 8 Cal. 398.

[4] Duval *v.* Bibb, 4 Hen. & M. 113.

(*j*) Lord Eldon, in Mackreth *v.* Symmons, (15 Ves. 344,) expresses a strong regret as to the condition of the question in the English courts. He says: — "The more modern authorities upon this subject have brought it to this inconvenient state, that the question is not a dry question upon the fact, whether a security was taken, but it depends upon the circumstances of each case, whether the Court is to infer whether the lien was intended to be reserved, or that credit was given, and exclusively given, to the person from whom the other security was taken."

a mere sale, but no actual conveyance.[1] A vendor, retaining the title as security, retains the lien as long as he continues to have a right of action for the purchase-money.[2] So, where a vendor takes a bond for the price, retaining the title, he does not lose his lien by surrendering the bond and taking an order upon a third person, payable at a future day, which is not accepted. And he may enforce the lien before the order falls due.[3] So a vendee sold a portion of the land, with notice of the vendor's lien, and with an agreement that the second purchaser might arrange with the vendor for the purchase-money, provided he would procure from the vendor a release of the vendee to that amount. The purchaser accordingly gave the vendor his note, and the latter released the vendee, as agreed. Held, the vendor still retained a lien for the whole purchase-money.[4] So an agreement, that the purchase-money shall be in part paid by the *rents* of the land sold, is no waiver of the vendor's lien. Thus A. leased a tenement to B., and afterwards sold it to C., agreeing that the rent reserved should be received by A., as so much of the purchase-money. Held, if in consequence of the sale the right of the vendor to collect the rents was lost or impaired, the vendee could not release or collect them without accounting for them to the vendor; and that the agreement above stated did not affect the lien.[5]

38. But the taking of *independent collateral security* is said to be "to some extent inconsistent with the continued existence of the lien."[6] And this though the security prove worthless.[7] The distinction is made, that a bond, note, or covenant given by the vendee will not amount to "evidence of a waiver of the implied lien," but will only be deemed an additional security, like a bond accompanying a mortgage, and may be necessary to control the receipt indorsed on the

[1] Clower *v.* Rawlings, 9 Sm. & M. 122.
[2] Hanna *v.* Wilson, 3 Gratt. 243.
[3] Knisely *v.* Williams, 3 Gratt. 265. (See § 62.)
[4] Honore *v.* Bakewell, 6 B. Mon. 67. (See § 63.)
[5] Kyles *v.* Tait, 6 Gratt. 44.
[6] Manly *v.* Slason, 21 Verm. 271; Shelby *v.* Perrin, 18 Tex. 515.
[7] Johnston *v.* Union, &c., 37 Miss. 526.

deed, or admitted in the body of it. A bond by a third person for the purchase-money, or with a third person as security; or a lien agreed upon by keeping the deed of conveyance as an escrow for part of the purchase-money, and an agreement when that is paid to deliver the deed, and to take bonds or negotiable paper indorsed for the residue; evince a design to release the lien for the residue. So would a mortgage upon other lands of the vendee, than those purchased of the vendor; and so might other facts which manifest that a "lien was not intended by the parties."[1] And where an equitable interest in land was sold, and security taken for the purchase-money, by which the vendor's lien was extinguished, and the legal title afterwards came to him by deed of trust; he was not allowed to retain such title as security for his debt.[2] So, where a part of the price is to be paid, and the rest secured by a deed of trust of the land, and half the cash payment is made, and the deed given; there is no lien for the balance.[3] So, if A. sells to B., and B. to C., and by an agreement between all parties C. mortgages to A. to secure the purchase-money due A.; B. has no lien.[4] Nor is there a lien, where the vendee gives his notes to creditors of the vendor, and afterwards a mortgage.[5] And a vendor was held to have lost his lien, by taking other security after two years from the sale, and conveying the land to the vendee for the express purpose of enabling him to raise money on it by mortgage.[6]

39. But, to constitute a waiver, it is held that the security must be given in pursuance of the original agreement, and not by the vendee's voluntary act.[7] And that taking other specific security or a surety is no waiver of the lien, where no actual conveyance is made, and such conveyance may be withheld till payment.[8] So that a surety, who pays the

[1] Per Haywood, J., Eskridge *v.* M'Clure, 2 Yerg. 84. See Schanck *v.* Arrowsmith, 1 Stockt. 314.

[2] Follett *v.* Reese, 20 Ohio, 546.

[3] Phillips *v.* Sanderson, 1 Sm. & M. 462.

[4] Taylor *v.* Adams, Gilm. 329.

[5] M'Clure *v.* Harris, 12 B. Mon. 261.

[6] Clower *v.* Rawlings, 9 Sm. & M. 122.

[7] Van Doren *v.* Todd, 2 Green Ch. 397.

[8] Lewis *v.* Caperton, 8 Gratt. 148; Kleiser *v.* Scott, 6 Dana, 137.

debt, shall be substituted to the lien of the vendor, if a lien were expressly reserved.[1] And it has been sometimes held, that the lien is not waived by taking a mortgage for security, but shall prevail over a judgment recovered between the making and recording of the mortgage. Though it is in general held otherwise, where a mortgage is taken on the land sold.[2] (*k*)

40. The lien is not waived by taking notes for the price, though payable on time;[3] more especially if worthless, and if there be any fraud, or if for only part of the price.[4] So, though a note *may* be paid in specific property.[5] So the taking of an indorser is held not conclusive evidence of waiver, but liable to be rebutted by other proof.[6] So the lien may continue, notwithstanding a renewal of the notes originally given,[7] or other extension of payment; especially if the lien is expressly reserved in such extension.[8] Or if the note of a third person is substituted for that of the vendee.[9] Or an independent debt included in the new note.[10] And the taking of a bank check for the price has been held to be no waiver.[11] Though it is otherwise, where an order on a

[1] Uzzell *v.* Mack, 4 Humph. 319; Shay *v.* Patty, 1 Cart. 102.
[2] Boos *v.* Ewing, 17 Ohio, 500; Young *v.* Wood, 11 B. Mon. 123. But see Neil *v.* Kinney, 10 Ohio St. 67.
[3] Manly *v.* Slason, 21 Verm. 271.
[4] Shelton *v.* Tiffin, 6 How. 163; Kercheval, 14 La. An. 457.
[5] Plowman *v.* Riddle, 14 Ala. 169.
[6] Campbell *v.* Baldwin, 2 Humph. 248.
[7] Aldridge *v.* Dunn, 7 Blackf. 249; Thornton *v.* Knox, 6 B. Mon. 74.
[8] Truebody *v.* Jacobson, 2 Cal. 269; Cleveland *v.* Martin, 2 Head, 128.
[9] Tiernan *v.* Thurman, 14 B. Mon. 277.
[10] Mims *v.* Lockett, 23 Geo. 237.
[11] Honore *v.* Bakewell, 6 B. Mon. 67.

(*k*) A vendor of an absolute title has no lien upon the property, by reason of an unpaid mortgage, given by him upon other property, to secure to his vendor, of a portion of the property sold, the price of that portion; although the vendee has, by agreement, been substituted in his place, for the payment of the price of that portion of the property sold to him. Schroeder *v.* Patterson, 4 R. I. 516.

Where a mortgage, given for part of the purchase-money, is so far void, for misdescription or ambiguity, as to defeat the mortgagee's suit in chancery to foreclose, it is void for all purposes, and cannot be set up as a waiver of the vendor's lien for the purchase-money. Davis *v.* Cox, 6 Ind. 481.

third person is given, and the vendor is guilty of *laches* in notifying the vendee of non-payment; thereby subjecting him to loss.[1] And where a vendor took notes for the price, and gave bond to convey on payment thereof; though for these notes the notes of another person, guaranteed by the purchaser, were afterwards substituted: held, the vendor had still a lien for the price.[2] (*l*)

41. Where a vendor retains the title, and receives collateral securities with an agreement to collect them, and employs the vendee to make such collection; he still retains his lien for the price, notwithstanding the payment of the securities to the vendee, until the vendee accounts for the amount received, even as against judgment creditors whose lien accrued before the payment. And the assignee of the vendor succeeds to his rights as existing at the time of assignment.[3]

42. Where a vendor brings an action for the first instalment of the purchase-money, recovers judgment, and levies execution upon the land, his lien is gone; and equity will compel him to convey the legal title to the execution purchaser.[4] But a judgment against a vendee, by articles of agreement, binds only his interest in the land to the extent of the purchase-money paid; the balance is a lien on the premises. So, although after judgments obtained against

[1] Fowler *v.* Rust, 2 A. K. Mar. 294.
[2] Anthony *v.* Smith, 9 Humph. 508.
[3] Watson *v.* Willard, 9 Barr, 89.
[4] Thompson *v.* McGill, 1 Freem. Ch. 401.

(*l*) If the vendor transfers to a stranger the notes given for the purchase-money, and accepts for them a bill of exchange, his lien on the land is gone, and the vendee, on making full payment to the transferree, becomes entitled to an absolute conveyance; but if the transferree was acting as agent of the vendee, or was jointly concerned with him in the purchase, and made the arrangement for their joint benefit, without an express promise on the part of the vendor to receive the bill of exchange in absolute payment of the notes, and thereby to abandon his lien, the land is still bound to the vendor for the payment of the purchase-money on the non-payment of the bill. Bradford *v.* Harper, 25 Ala. 337.

the vendee, the latter, by a parol agreement, gives up the articles of agreement, absolutely, to one to whom he had previously transferred them as collateral security, and the latter receives a deed for the premises from the vendor.[1]

43. Where an administrator sells land by order of Court, and takes personal security for the price, he does not thereby discharge his lien.[2] But where a testator directs that his lands be sold, and the proceeds divided among his children, and they sell their interest, taking bonds for the price; they have no lien on the land.[3]

44. Where a creditor of the vendor obtains a judgment against the vendee as garnishee, and sells the land, and the vendor bids at the sale; he does not thereby waive his lien.[4]

45. If the vendee is evicted from part of the land by paramount title, the lien is diminished *pro tanto*.[5]

46. It is sometimes held, that *an assignee* of a claim for the price has a lien;[6] more especially, where only a bond for title has been given.[7] Or, where the lien is expressly reserved in notes, payable to bearer.[8] Thus if the vendor assigns notes given for the purchase-money, the lien has been held to pass with them. And although a deed is subsequently made to the vendee, the lien is held to be good against a judgment recovered after the deed.[9] And the transfer may be made by a mere blank indorsement.[10] So where a vendor assigns notes given for the purchase-money, without indorsement, it is held that the assignee may enforce a lien against a purchaser with notice. So also may the vendor, when the notes are returned to him. (*m*) But not a

[1] Russell's Appeal, 15 Penn. 319.
[2] Hoggatt *v.* Wade, 10 Sm. & M. 143.
[3] Sharp *v.* Kerns, 2 Gratt. 348.
[4] Farmer *v.* Simpson, 6 Tex. 303.
[5] Mims *v.* Lockett, 23 Geo. 237.
[6] Honore *v.* Bakewell, 6 B. Mon. 67. See M'Brayer *v.* Collins, 18 B. Mon. 833; Fisher *v.* Johnson, 5 Ind. 492; Terry *v.* George, 37 Miss. 539; 19 Tex. 213; M'Alpin *v.* Burnett, Ibid. 497.
[7] 37 Miss. 539. See Cleveland *v.* Martin, 2 Head, 128.
[8] Murray *v.* Able, 19 Tex. 213.
[9] Parker *v.* Kelly, 10 Sm. & M. 184; Kern *v.* Hazlerigg, 11 Ind. 443.
[10] Moore *v.* Raymond, 15 Tex. 554.

(*m*) A vendee of land, having taken a bond for conveyance, to be made

holder of collateral security for the notes.[1] So the lien of a vendor for the purchase-money passes to the *devisee* of the vendee's notes.[2] So, where several notes are assigned at different times, the assignment of each is, *pro tanto*, an assignment of the lien, unless expressly waived, and the liens are preferred according to the priority of the assignments, without reference to the maturity of the notes.[3] So where a memorandum is made upon the face of the bond given for the price, that the land shall be liable for the debt; an assignee of the bond has in equity the same lien which the assignor had.[4] So, where land was conveyed by deeds, in which there was recited a consideration of $800, "paid and secured to be paid;" and the vendee gave his note for part, which the vendor's agent assigned to A.: held, on a bill by the vendee, to enjoin A. against enforcing his judgment until the lien was released, that as the lien, if there were any, passed with the note to the assignee, it would be extinguished by payment of the note.[5] So judgments were recovered in several actions by the vendor of land, upon two notes of equal amount, given for the purchase-money. The vendee sold one undivided moiety of the land to A., and the other to B., when each agreed to pay one of the judgments. C., at the request of A. and B., took an assignment of the judgments, A. promising C. to pay him one of the judgments, and B. the other. The judgment which A. was to pay was paid to C. On a bill to enforce the lien of the vendor upon the land, it was held, that an undivided half of the

[1] White *v.* Stover, 10 Ala. 441; Norvell *v.* Johnson, 5 Humph. 489; Kelly *v.* Payne, 18 Ala. 37; Roper *v.* McCook, 7 Ala. 318.

[2] Tierman *v.* Beam, 2 Ham. 383.

[3] Griggsby *v.* Hair, 25 Ala. 327.

[4] Eskridge *v.* McClure, 2 Yerg. 84.

[5] Wilder *v.* Smith, 12 B. Mon. 94.

---

on payment of the price, and, before such payment, assigned the bond; brings a bill in equity against the assignee to enforce a lien for the purchase-money, not making the original vendor a party. Held, the suit could not be maintained. Thompson *v.* Williams, 10 Sm. & M. 173. See Briggs *v.* Hill, 6 How. (Miss.) 362; Claiborne *v.* Crockett, 3 Yerg. 27; Green *v.* Demoss, 10 Humph. 371; Wellborn *v.* Williams, 9 Geo. 86.

land could be subjected to the payment of the outstanding judgment.[1] So the plaintiff advanced money to another person, to enter at a land-office a tract of land for him, which the receiver of the money did in his own name, and a patent was issued accordingly. Afterwards the patentee was authorized by the plaintiff to sell the lands for him, which he did, taking notes for the price, payable to the patentee. The notes were delivered, but not indorsed, to the plaintiff, who recovered judgment upon them for his own use, in the payee's name, which remained unsatisfied. Held, the plaintiff might enforce a lien for the purchase-money.[2] And more especially the lien is not lost, where the vendor assigns the security merely for payment of his debts, so far as it is sufficient for that purpose,[3] or as collateral for a debt. In such case, the assignor and assignee must join in a suit to enforce the lien.[4] So where the vendor has given bond for title, from which, of course, he cannot be released without consent of the vendee.[5] (*n*)

[1] Wilkins *v.* Humphreys, 23 Miss. (1 Cush.) 311.
[2] Graggs *v.* Bailey, 10 Ala. 344.
[3] Halleck *v.* Smith, 3 Barb. 267.
[4] Plowman *v.* Riddle, 14 Ala. 169; Betton *v.* Williams, 4 Flor. 11.
[5] Ibid.

(*n*) The equitable lien held by the Court, for the purchase-money of land sold under its decree, cannot be enforced by a trustee who has assigned the bonds given for its payment, whether made with or without the sanction of the Court. Hayden *v.* Stewart, 4 Md. Ch. Decis. 280.

Whether, in case of an assignment, the parties intended to abandon the lien, is a matter of fact, to be gathered from the evidence and the nature of the transaction. Griggsby *v.* Hair, 25 Ala. 327.

When lands are purchased by a partnership from one of its members, who pledges his entire interest in the company to indemnify it against any loss which it might sustain in the purchase, and guarantees that the land can be resold within five years for at least the amount of the purchase-money, and the lands remain unsold after the expiration of the five years; an assignee of the notes given for the purchase-money cannot assert a vendor's lien, as against a member of a company who had guaranteed their payment, and had paid a part of them. Nor against a remote *bonâ fide* purchaser of the vendor's interest in the company, without notice. The vendor, being a member of the company, cannot assert a vendor's lien, as against subsequent

47. It has been held in other cases, however, that, if the vendor assigns his security for the price absolutely, the lien is lost. Also, that the lien does not pass with the note given for the price.[1] Thus, where an agent sells land of his principal, and fraudulently takes a note for the purchase-money in his own name, which he assigns, the vendor's lien does not pass to the assignee of the note.[2] So A. agreed, in 1840, to sell a lot of land to B., who gave his note for the purchase-money, payable in 1846. On the same day, A. indorsed the note to C., and guaranteed the payment. A., with others, absconded to Alabama, where C. pursued him, and sued him on B.'s note, with others, and compelled him to compromise, by conveying to C. enough property, by mortgage, to secure all the debts. C. agreed to extend the time of paying B.'s note five years, and, on A.'s making a clear title to the land agreed to be sold to B., either to B. or C., to relieve him from his liability as guarantor. A. offered C. a deed of the land, which he refused, and A. sold it to D., against whom C. brought his bill to enforce his lien, as assignee of the vendor's security. Held, C. did not, by taking B.'s note with A.'s guaranty, acquire any lien on the land, but that the transaction was a waiver of any lien, as the guaranty was a substitution of personal for real security, and that as against D. the lien had been waived by all these proceedings, if C. had ever had a lien, which he, as assignee, could enforce.[3] So the assignee of a note given for the purchase-money of land, with surety, is not, after discharging the surety, entitled to enforce the vendor's lien on the land.[4]

48. A purchaser cannot avoid the vendor's lien on the

[1] Webb *v.* Robinson, 14 Geo. 216; Jackman *v.* Halleck, 1 Ham. 318; Brush *v.* Kinsley, 14 Ohio, 20; Taylor *v.* Foote, Wright, 356; Horton *v.* Horner, 14 Ohio, 437; Dixon *v.* Dixon, 1 Md. Ch. 220; 25 Ala. 327. See Walker *v.* Williams, 30 Miss. 165; Shall *v.* Biscoe, 18 Ark. 142.

[2] Deibler *v.* Barwick, 4 Blackf. 339.

[3] Woods *v.* Bailey, 3 Florida, 41.

[4] Martin *v.* Lundie, 6 Ala. 427.

---

creditors, mortgagees, or purchasers, without proving that they advanced their money with notice of his lien. Coster *v.* Bank of Georgia, 24 Ala. 37.

ground of *want of title* in the latter, unless he alleges and proves the specific defects.[1] Nor on the ground of an outstanding mortgage, unless it be shown to have been made by a party having authority to execute it.[2] And where a bill in equity was brought against the widow and heirs of a deceased purchaser, to enforce the vendor's lien; and the widow set up in defence: 1. That the plaintiff had no title, and the purchaser had consequently abandoned the purchase; 2. That he had paid the purchase-money; 3. That since his death she had acquired a title, under a deed of trust made by him; held, the grounds of defence were inconsistent with each other, and that the plaintiff was entitled to enforce the lien.[3]

49. Where land is sold under authority of the Orphans' Court, and a part of the price remains unpaid, the interest of which goes to the widow for life, remainder to the heirs; the lien for the price is not discharged by a sheriff's sale under a judgment against the purchaser. Hence, all prior liens are unaffected.[4]

50. But where land is sold under articles, and the vendor afterwards sells it upon a judgment for the price, the judgment purchaser acquires a legal title, discharged of the vendor's lien for the purchase-money, and the latter is entitled to payment, in preference to liens prior to his judgment upon the title of the vendee.[5]

51. Sale of several lots on credit. The vendee sold two of them to different purchasers, the first vendor agreeing with one of them to release his lot upon payment of a certain sum, but not being then informed that the latter had sold to a sub-purchaser. The vendor obtained a decree in Chancery for a sale, to satisfy his lien, and assigned the decree. Held, the decree charged the land held by the sub-purchaser, notwithstanding the above arrangement for a release; and could not be discharged by payment of a sum corresponding with

[1] Glasscock *v.* Robinson, 13 Sm. & M. 85.
[2] Ibid.
[3] Ibid.
[4] Lauman, 8 Barr, 473.
[5] Horbach *v.* Riley, 7 Barr, 81.

what was paid under this arrangement, taking into view the relative value of the two lots.[1] (*o*)

[1] Kirksey *v.* Mitchell, 8 Ala. 402.

(*o*) A vendee gave his note for part of the price to a creditor of the vendor, who gave credit to the vendor for that amount. Upon the subsequent failure of the vendee, the vendor took back the land for a lower price, and sold it to the creditor, also for a lower price than the vendee had agreed for. Held, in the absence of an express agreement, such creditor had no lien upon the land, which was not subordinate to that of the vendor. Colcord *v.* Seamonds, 6 B. Mon. 265.

A vendee sells to one without notice, taking a note for the price, which is assigned for value, before the maker has notice of the non-payment of the original consideration. Held, the vendor could not assert a lien against him, and that the assignee was entitled to payment of the note, although, after notice of the non-payment, the maker said he would not pay his note, unless he were made safe. Nor will the assignee's right to retain the money be impaired, by his giving the maker an indemnity as an inducement to pay the note. Houston *v.* Stanton, 11 Ala. 412.

A., a trustee under a decree in Chancery, to invest trust funds, agreed with B., the surety in his trust bond, to lend him a part of the trust funds, taking a mortgage as security. He accordingly advanced half of the sum agreed, undertaking to apply the balance to pay a judgment against B. B. subsequently executed a mortgage to secure the whole amount. A. did not pay the judgment, and the mortgage was never recorded, nor reported to the Chancellor for approval, but was returned to the mortgagor and destroyed. A. received trust money, which he failed to invest, and was removed from office, and a new trustee appointed. The lands were sold by the sheriff to the defendant for one twelfth part of the amount advanced by A. to B., subject to prior judgment liens, of nearly their full value. The *cestuis que trust* file a bill, claiming a lien on the lands. Held, the bill could not be maintained, the circumstances not proving a certain, distinct, and consummated contract for such lien, between A. and B. Gill *v.* McAttee, 2 Md. Ch. 255.

An administrator, whose intestate had a lien for the purchase-money on land sold to an insolvent, persuaded the insolvent to sell, bid himself at the sale, publicly stated that the purchaser would get a good title, and proved his claim against the insolvent estate, and received a dividend. Upon a bill to enforce the lien without offering to return the dividend, he was held estopped to object to the purchaser's title, without prejudice to the rights of the heirs, if they choose to attempt to assert them. Williamson *v.* Ross, 33 Ala. 509.

52. The lien of a vendor will be barred by the lapse of twenty years; but whether by a limitation which is sufficient to bar the personal claim of the vendor, is somewhat doubtful. The weight of authority seems to be, that it is not thus barred. An acknowledgment, that the purchase-money has not been paid, will prevent the limitation.[1] (*p*)

53. The mode or form of enforcing a vendor's lien for the purchase-money seems to be substantially the same as that of enforcing an ordinary mortgage; by bill in equity against the vendee or those claiming under him. (*q*) But the rule, that the mortgagee may pursue all his remedies at once, does not apply to a vendor having a bond and equitable lien for the purchase-money.[2]

54. Where a vendor, who has merely given a bond for title, brings a bill to enforce his lien, he need not join as a party defendant an execution purchaser of the vendee's interest, although he is in possession; unless he is also owner of the vendee's title under the bond; the execution sale having passed nothing.[3]

55. Where a vendor seeks to subject land sold, but not conveyed, to payment of the consideration, the Court may order him to exhibit, by a certain day, a sufficient conveyance, with a relinquishment of dower, if he has a wife, warning the vendee to deposit in Court, on the same or a succeeding day, the amount due; and on the filing of such conveyance, and failure to make the required deposit or payment, may subject the land to sale.[4]

[1] Lingan *v.* Henderson, 1 Bland, 282; Magruder *v.* Peter, 11 Gill & J. 218; Moreton *v.* Harrison, 1 Bland, 491; Driver *v.* Hudspeth, 16 Ala. 348; Erving *v.* Beauchamp, 6 B. Mon. 422; Littlejohn *v.* Gordon, 32 Miss. 235; Relfe *v.* Relfe, 34 Ala. 500.

[2] Barker *v.* Smark, 3 Beav. 64.

[3] Driver *v.* Clark, 13 Ala. 192.

[4] Clark *v.* Bell, 2 B. Mon. 1.

(*p*) In Alabama, a lien will not be established in equity against slaves, simply because a note for the price has become barred by the statute of limitations. Moore *v.* Lesueur, 33 Ala. 237.

(*q*) In Indiana, a vendor is not required to *attach* the property of the vendee, though he has absconded. He may enforce his lien in equity. Russell *v.* Todd, 7 Blackf. 239.

56. If a vendor has a lien, and a mortgagee under the purchaser brings a bill to foreclose, the Court should decree a sale, and appropriate the proceeds, first to the payment of the lien, and next of the mortgage.[1] (*r*)

57. A bill to enforce a lien should fully describe the contract of sale, and the non-payment of the price.[2]

58. The usual decree in a suit of this nature is for a sale of the land, unless the debt be paid by a certain day.[3] In justification of this course of proceeding, as applied to a purchaser from the first vendee, the Court in Georgia remark as follows: — "The title to his land has been vested in the company by operation of law. The corporation having complied strictly with the provisions of its charter, he cannot maintain trespass or ejectment. A suit upon the certificate would be wholly unavailable, owing to the insolvency of the company. He is consequently wholly remediless, unless equity will interpose for his relief, by decreeing a sale of the property for the payment of the purchase-money. And we are of the opinion that he is entitled to this relief. Nor will this judgment serve in the least to impede or obstruct the great enterprise. The present proprietors, who bought with notice, have only to pay to this citizen the price put upon his property by commissioners appointed for that purpose, upon their own application."[4]

59. A decree to enforce the vendor's lien has been held erroneous, if it does not name a day for the parties to redeem the property.[5] So also is a decree, directing a sale for cash, instead of allowing a reasonable credit.[6] But at

[1] Mosely *v.* Garrett, 1 J. J. Marsh. 212. See Neas's, &c. 31 Penn. 293.
[2] Hough *v.* Canby, 8 Blackf. 301.
[3] Eskridge *v.* McClure, 2 Yerg. 84.
[4] Per Lumpkin, J., Mims *v.* Macon, &c. 3 Kelly, 342.
[5] Kyles *v.* Tait, 6 Gratt. 44.
[6] Alford *v.* Helms, 6 Gratt. 90.

(*r*) Claim by an equitable mortgagee against the mortgagor, asking for a sale, and that other mortgagees might be summoned before the Master, or a decree made to ascertain what mortgages there were and their priorities. Order refused. Burgess *v.* Sturgis, 8 Eng. Law & Eq. 270.

any time before a sale the defendant may redeem the land, although the decree does not expressly so provide.[1]

60. In a suit to enforce his lien, the vendor of land will be compelled to do equity. Hence, if the vendee bids off the land upon an execution sale against the vendor, founded upon a judgment recovered after the purchase, he shall be allowed the amount paid to the officer.[2] But where A. bought at an administrator's sale land subject to the lien of B. for the purchase-money, and B. afterwards brought a suit against A. to enforce the lien, when a sale was decreed, and the purchase-money ordered to be applied to the lien; held, A. had no right to receive first what he had paid to the administrator.[3]

61. The principle of equitable apportionment of the debt, among different parcels of land subject to one incumbrance, is held applicable to the lien of a vendor. It is said, "There is no difference in principle between the lien of a vendor, under an agreement for the sale of land, part of which is subsequently sold by the vendee, and that of a mortgage to secure the purchase-money after a conveyance by the mortgagor under similar circumstances. In either case, equity would require that the lien should be satisfied by sale of the different parcels in the inverse order of their alienation."[4] (See §§ 23, 26.)

62. A sale made for satisfaction of a vendor's lien, like a sale under a mortgage, vests an absolute title in the vendee.[5]

63. If a vendor, having a lien for purchase-money, part of which only is due, enforce it for that part, the lien is exhausted, and cannot be enforced as to the balance.[6] So, where part-payment is made, and a note given for the balance, which is not paid, the vendor may pay or tender back the money, and rescind the contract; but where he has elected to affirm the contract, has sued on the note, and has

[1] Winter *v.* Rose, 32 Ala. 447.
[2] Foreman *v.* Hardwick, 10 Ala. 316.
[3] Delassus *v.* Poston, 21 Mis. 543.
[4] Per Gardiner, J., Crafts *v.* Aspinwall, 2 Comst. 291, 292; Wright *v.* Atkinson, 3 Sneed, 585.
[5] Amory *v.* Reilly, 9 Ind. 490; 7 Barr, 81.
[6] Codwise *v.* Taylor, 4 Sneed, 346.

procured a decree and sale of the land, he cannot again subject it to sale.[1]

64. The lien of unpaid purchase-money, under an Orphans' Court sale, the interest of which is payable to the widow for her life, remainder to the heirs, is not discharged by a sheriff's sale under a judgment against the purchaser; hence all prior liens are unaffected; but the arrearages of interest and of prior annuities are discharged, and the proceeds of the sale should therefore be applied thereto.[2]

65. Where land is sold under articles, and the vendor under a judgment for the purchase-money sells the land; he will be entitled to payment in preference to liens, prior to his judgment, on the title of the vendee.[3]

66. Where vendors and vendee joined in a mortgage on a part of the lands, judgment having been obtained against the vendee on the day preceding, it was held: 1. That the vendors waived their lien on the mortgaged portion to the amount of the mortgage claim, but that the lien remained entire on the remaining lands, for the whole of the unpaid purchase-money. 2. That a vendor's lien can be assigned only by express words. 3. Equity will direct the judgment creditor to look first to the lands outside the mortgage. 4. If these are not sufficient to satisfy the lien and the judgment, the former shall be abated by the amount of the mortgage, or as much thereof as will satisfy the judgment. 5. If the proceeds of the sale of the mortgaged land exceed the mortgage debt, the surplus shall be added to the outside lands, from which fund shall be paid: (1.) The vendor's lien, deducting the amount of the mortgage; (2.) The judgment; (3.) The surplus due the vendor. If, in this order, any part of the judgment shall be unsatisfied, the deficiency shall be supplied out of the proceeds of the mortgaged land. 6. It must be ascertained whether the outside lands are not sufficient to satisfy the vendors and the judgment, before the mortgagee shall have his claim reduced or abated. 7. If, in this

[1] Amory *v.* Reilly, 9 Ind. 490.
[2] Lauman's Appeal, 8 Barr, 473.
[3] Herbach *v.* Riley, 7 Barr, 81.

mode of settlement, any difficulties shall arise, the Court may, if the equity of the case justifies it, order the judgment to be paid from the proceeds of the mortgaged premises, and to be assigned to the mortgagee. Or they may order such assignment, should the mortgagee choose to pay the claim from his own funds.[1] (*s*)

[1] Watson *v.* Bane, 7 Md. 117.

(*s*) A lien has been sometimes upheld, which is the precise converse of, but treated as analogous to, that described in the foregoing chapter; to wit, the lien of *a purchaser*, who has paid the purchase-money *punctually*, *prematurely*, or *by surprise*, before receiving an actual conveyance. Payne *v.* Atterbury, Harring. Ch. 414. See Coote, 265; Lowell *v.* Mutual, &c., 8 Cush. 132; Ætna, &c. *v.* Tyler, 16 Wend. 385.

Upon this subject Judge Story remarks as follows: — "In Burgess *v.* Wheate, (1 W. Bl. 150, 1 Ed. 211,) Sir Thomas Clarke, M. R., said, 'Where a conveyance is made prematurely, before money paid, the money is considered as a lien on that estate in the hands of the vendee. So where money was paid prematurely, the money would be considered as a lien on the estate of the vendor for the personal representatives of the purchaser; which would leave things *in statu quo*.' Mr. Sugden seems to have doubted whether this lien exists in favor of the vendee, who has paid the purchase-money. For, alluding, as it should seem, to such a case, he says, 'Where a lien is raised for purchase-money under the usual equity in favor of a vendor, it is for a debt really due to him, and equity merely provides a security for it. But in the case under consideration, equity must not simply give a security for an existing debt; it must first *raise* a debt against the express agreement of the parties. The purchase-money was a debt due to the vendor, which, upon principle, it would be difficult to make him repay. What power has a court of equity to rescind a contract like this? The question might perhaps arise, if the vendor was seeking relief in equity. But in this case he must be a defendant. If it should be admitted that the money cannot be recovered, then, of course, he must retain the estate also, until some person appears who is by law entitled to require a conveyance of it.' (Sugden on Vendors, p. 258, 7th ed.) Lord Eldon cited the same position of Sir Thomas Clarke, in his very words, without objection or observation, in Macreth *v.* Symmons, 15 Ves. 345. And afterwards, in the same case, p. 353, he used language importing an approval of it. 'This,' said he, 'comes very near the doctrine of Sir Thomas Clarke, which is very sensible, that where the conveyance *or the payment*

has been made by surprise, (meaning, it is supposed, *prematurely*, in the sense of Sir T. Clarke,) there shall be a lien.' The ground asserted by Mr. Sugden for his doubt does not seem sufficient to sustain it. He assumes that there is no debt between the parties, which is the very matter in controversy, for in the view of a court of equity, the payment of the purchase-money may well be deemed a loan upon the security of the land, until it has been conveyed to the vendee. At least, there is quite as much reason to presume it, as there is reason to presume the land, when conveyed, to be still a security for the purchase-money due to the vendor. In the latter case, though there is a debt due by the vendee, it does not follow that it is a debt due by the land. In the former, if the estate cannot be conveyed and is not conveyed, the money is really a debt due to the vendee. At all events, in equity it is not very clear what principle is impugned by deeming the money a lien upon the ground of presumed intention." 2 Story's Eq. § 1217, n. 4. See Oxenham *v.* Esdaile, 3 Y. & Jer. 264; Ludlow *v.* Grayall, 11 Price, 58; Finch *v.* Winchelsea, 1 P. Wms. 282; Small *v.* Attwood, 1 Younge, 507.

In New York, after a contract to sell land, the vendor is a mere trustee, and has only a lien. His interest is personal estate. Especially if possession has been delivered. Smith *v.* Gage, Law Reg. May, 1863, p. 438.

In Indiana, a vendee of real estate has a lien thereon for the money paid, if the vendor refuse to convey; and the lien continues against a subsequent purchaser with notice. Shirley *v.* Shirley, 7 Blackf. 452.

It is held in Kentucky, that a vendee of land under a parol contract, though he cannot have specific performance, may enforce a lien on the land for the purchase-money and his improvements. Brown *v.* East, 5 Monr. 405.

In Alabama, a purchaser of land, who has paid part of the purchase-money, but has only a bond for title when the purchase-money is paid, has an interest which he may convey absolutely or in mortgage, subject, however, to the first vendor's lien. Fenno *v.* Sayre, 3 Ala. 458.

In the same State, where one, having only a bond for a title, transfers it to a surety for the purchase-money; this is an equitable mortgage, which may be foreclosed. Hayes *v.* Hall, 4 Port. 374.

In a late English case, A., the owner and keeper of a hotel, agreed with B., his son-in-law, to sell it to him, and assist in conducting it, receiving half the profits. The wife of B. afterwards assisted in conducting the hotel. B., not having the funds required for the business, wrote to A., "you must mortgage or sell the premises." He afterwards applied to A. for a mortgage, to secure sums claimed by him, and brought an action, in part for the services of his wife. A. having become bankrupt, B. files a bill against the assignees, praying for specific performance of the agreement, or that he might be declared to have a lien for his advances. Held, although he might have had a lien if the contract had failed through the fault of A., such lien was

defeated by his own abandonment of the purchase. Dinn *v.* Grant, 17 Eng. Law & Eq. 526.

An advance of money to a mortgagee, under an agreement that the mortgage shall be assigned to the lender, substitutes the latter, in equity, in place of the former. Rockwell *v.* Hobby, 2 Sandf. Ch. 9.

A son advanced money to pay off a mortgage against his mother; no assignment was executed, and the securities were lost; but the title-deeds were found in his hands. Held, he had an equitable lien. Rockwell *v.* Hobby, 2 Sandf. Ch. 9.

A married woman, having conveyed land by a defective conveyance, represented to a purchaser from her vendee that the title was good, and thereby induced him to pay out money. After her death, her heirs sought to avoid the conveyance, and eject such purchaser. Held, in equity, they were bound to reimburse the sum paid by him, and, being non-residents, that he had a lien upon the land therefor. Blackburn *v.* Pennington, 8 B. Mon. 217.

As to an equitable title in *government lands*, growing out of a payment of the purchase-money, see Regan *v.* Walker, 2 Chand. (Wisc.) 133. As to *equitable mortgages*, in general, see Northrup *v.* Cross, Law Rep. August, 1853, p. 232; Waldron *v.* Sloper, 19 Eng. Law & Eq. 111; James *v.* Rice, 23 Ibid. 567; Storer *v.* Bounds, 1 Ohio, St. 107; Stockett *v.* Taylor, 3 Md. Ch. Dec. 537.

CHAPTER XXIV.

REGISTRATION OF MORTGAGES.

General requisition of registration in the United States; not necessary *between the parties*, &c.; operation of an unrecorded mortgage, as against other incumbrances; registration, how far notice; not necessary, as against parties having notice; what shall constitute such notice; form of registration, &c.

1. In the foregoing chapters, (*a*) incidental reference has been often made to the *registration* or *recording* of mortgages, as an indispensable requisite to their perfect validity and effect; in conformity with the prevailing American system of *notoriety* in the title to real property. In all the States, express provision is made for the recording of *deeds;* applying, in the absence of express provisions to the contrary, as well to mortgages as to absolute conveyances. The plan of the present work does not include a statement of the minute statutory regulations upon this general subject, but only of such as relate specially to mortgages; which are comparatively very few.

2. Where statutory provisions, as to the recording of deeds generally, differ from those relating specially to mortgages, the latter shall prevail.[1]

3. An unrecorded mortgage is held void, as to a subsequent mortgagee without notice, although his deed is also unrecorded.[2]

4. Mortgages of equitable interests are held to be within the registry laws.[3]

[1] Weed *v.* Lyon, Harring. Ch. 363.
[2] Coster *v.* Bank of Georgia, 24 Ala. 37.
[3] General Ins. Co. *v.* United States Ins. Co. 10 Md. 517. (But see § 60.)

(*a*) See more particularly, pp. 44 and *sequ.*

5. An act providing for registration is a mere *statute of notice*, and registry is not evidence of *execution*;[1] nor does the fact, that a mortgage is found upon the record, raise a presumption of its delivery and acceptance, against the positive denial of the mortgagee and those claiming under him, that he ever received such mortgage, or had any knowledge of it.[2]

6. A mortgage, not acknowledged, or proved, and recorded, as required by statute, is not valid as against subsequent purchasers.[3] But, in general, a mortgage, like an absolute conveyance, is valid, *between the parties*, without registration.[4] So *scire facias* lies upon a mortgage, though improperly recorded.[5] And a mortgage defectively registered is a good equitable mortgage, and held to have preeedence of subsequent judgments.[6] So an unrecorded mortgage has been held to take precedence of a subsequent judgment,[7] or a subsequent assignment for creditors.[8] Especially if the judgment is not docketed.[9] So, as against one afterwards taking the property as security for an existing debt.[10] Though, if the land should be sold by the sheriff under the judgment, prior to the registry of the mortgage, a *bonâ fide* purchaser might be protected against the mortgage.[11]

7. Several mortgages may be *concurrent*, instead of *successive*, and the rights of the respective mortgagees may materially depend upon their registration. Thus, where three mortgages were successively made, at the same time, of the same property, by the same person, and handed in order to the register; held, the first had priority.[12]

[1] Munro *v.* Merchant, 26 Barb. 383.
[2] Foley *v.* Howard, 8 Clarke, 56. See Brown *v.* Kirkman, 1 Ohio St. 116.
[3] Jacoway *v.* Gault, 20 Ark. 190.
[4] See Salmon *v.* Clagett, 3 Bland, 126; Andrews *v.* Burns, 11 Ala. 691; Hartl. Dig. (Tex.) 835.
[5] Bank, &c. *v.* Herbert, 8 Cranch, 36.
[6] Bank, &c. *v.* Carpenter, 7 Ham. (1st part) 21; Fosdick *v.* Barr, 3 Ohio, (N. S.) 471; Leggett *v.* Bullock, 1 Busbee, Law, (N. C.) 283; Howard, &c. *v.* M'Intyre, 3 Allen, 571.
[7] Schmidt *v.* Hayt, 1 Edw. Ch. 652.
[8] Wyckoff *v.* Remsen, 11 Paige, 564; *contrà*, Bank, &c. *v.* Herbert, 8 Cranch, 36. See §§ 14, 22.
[9] Tuthill *v.* Dubois, 4 John. 216.
[10] Manhattan, &c. *v.* Evertson, 6 Paige, 457.
[11] Tuthill *v.* Dubois, 4 John. 216; *contrà*, Ash *v.* Ash, 1 Bay, 304; Ashe *v.* Livingston, 2 Bay, 84; Penman *v.* Hart, 251.
[12] Naylor *v.* Throckmorton, 7 Leigh, 98.

8. A person holding the legal title to land, in trust for his father, sold the land, at the request of the father, and took two mortgages upon the land for the purchase-money, one for the portion of the purchase-money belonging to the father, and the other as a compensation to an agent for effecting the sale. Both mortgages were executed to the son at the same time, but with the understanding that the mortgage for the benefit of the father was to take precedence, and it was recorded fifteen minutes earlier than the other, for the benefit of the agent; but the latter was assigned to the agent, before the assignment of the former to the father. Held, that the father's mortgage was entitled to priority, there having been no intervening *bonâ fide* purchase from the agent.[1]

9. Separate mortgages were made on the same day to two mortgagees. One of them was entered for record a short time before the other, but on the same day. The first mortgagee, being in possession under his deed, acknowledged in writing that the mortgages were concurrent, and that his was first recorded by mistake. He afterwards conveyed to a third person. Held, such writing, though not recorded, was admissible evidence against such third person.[2]

10. A trustee, having two sums of money, belonging to different *cestuis*, loaned both to one person at the same time, and took separate mortgages upon the same premises as security, not intending to give priority to either over the other; but one was received by the clerk for registry shortly before the other. The premises being sold, and the proceeds insufficient to pay both debts; held, the two should be paid ratably.[3]

11. Contract to sell certain land for $200. The vendee transferred his interest for $100, of which $10 was paid. Thereupon the vendor, at the request of the vendee, conveyed the land to the assignee, who mortgaged to the vendor for $200, and to the vendee for $90. The latter mortgage was

[1] Douglass *v.* Peele, 1 Clark, 563.
[2] Beers *v.* Hawley, 2 Conn. 467.
[3] Rhoades *v.* Canfield, 8 Paige, 545.

recorded two hours earlier than the former, and was assigned by the mortgagee for valuable consideration, without notice. On a bill by the assignee of the mortgage to the vendor to foreclose that mortgage, it was held, that the vendee's assignee should be protected as a *bonâ fide* purchaser, and his mortgage, being first recorded, should have priority over the vendor's.[1]

12. In general, a subsequent mortgage, duly recorded, to a party having no notice of the former one, has precedence of such prior mortgage.[2]

13. The lien of a second mortgagee, who has had his deed first recorded, will be preferred, unless there is proof of actual knowledge on his part of the prior unregistered conveyance, or that he knew circumstances sufficient to put him upon inquiry, and unless it appear that to allow the preference would be a fraud on the holder of the earlier deed.[3]

14. It is held that the holder of an unrecorded mortgage cannot, by giving notice of its existence at a sheriff's sale upon a judgment, bind the mortgaged estate in the hands of a purchaser at such sale, where the judgment creditor had no notice of the mortgage when his judgment was entered; nor, perhaps, where the judgment creditor had such notice.[4]

15. The record of a mortgage of land, which on the records appears to belong to the mortgagee, is no notice of a prior conveyance of such land from mortgagee to mortgagor.[5]

16. Registration of a subsequent mortgage is not sufficient notice to a prior mortgagee. Actual notice is necessary.[6]

17. A. mortgaged to B., and afterwards released his equity of redemption by deed duly recorded, and took a bond for

[1] Corning *v.* Murray, 3 Barb. 652.

[2] Pomet *v.* Scranton, Walk. 406; Clabaugh *v.* Byerly, 7 Gill, 354. See Hulings *v.* Guthrie, 4 Barr, 123; Frazer *v.* Jones, 5 Hare, 475; Wyatt *v.* Stewart, 34 Ala. 716.

[3] General, &c. *v.* United States, &c. 10 Md. 517.

[4] Uhler *v.* Hutchinson, 23 Penn. 110. See § 6.

[5] Pierce *v.* Taylor, 10 Shepl. 246.

[6] Truscott *v.* King, 6 Barb. 346; King *v.* M'Vickar, 3 Sandf. Ch. 192. See the remarks of Lord Redesdale, in Bushell *v.* Bushell, 1 Sch. & Lef. 103, and Latouche *v.* Dunsany, Ibid. 157. See also Underwood *v.* Courtown, 2 Ibid. 64.

reconveyance, which was not recorded; B. assigned the mortgage to C., but the assignment was not recorded, and was unknown to D., who purchased of B., after the assignment, but in good faith, and for valuable consideration. Held, D. took the land discharged of the mortgage.[1]

18. In general, as has been stated, the recording of a mortgage is notice both of the debt and the lien to all parties; though, without legal acknowledgment or proof, it is a nullity.[2] The record of an unsatisfied mortgage is sufficient to put a third person upon inquiry; and whatever puts a person upon inquiry is, in equity, notice to him of all the facts which such inquiry would have disclosed.[3]

19. Deed with a schedule annexed, describing the property, as "land, the title to which is in, &c., given as collateral security, to pay certain notes." The mortgage was not recorded. Held, the mortgage should have priority of the deed.[4]

20. If a registered mortgage mentions the bond intended to be secured by it, though not its contents; this is sufficient notice to subsequent purchasers.[5]

21. Registration is notice to a subsequent purchaser from the mortgagor, though the mortgagee neglects for ten years to claim under the mortgage, and the mortgagor has in the mean time become insolvent.[6]

22. It is held, that a subsequent mortgagee, having notice of the prior mortgage, though not recorded, takes subject thereto; though he forecloses his own mortgage and himself purchases the land at the sale.[7]

23. The general principle upon this subject is, that regis-

[1] Mills *v.* Comstock, 5 John. Ch. 214.

[2] Work *v.* Harper, 24 Miss. 517. See Peters *v.* Goodrich, 3 Conn. 146; Quinebaug, &c. *v.* French, 17 Conn. 129; Mix *v.* Hotchkiss, 14 Conn. 33; Miller *v.* Helm, 2 Sm. & M. 687; Copeland *v.* Copeland, 28 Maine, 525; Knickerbacker *v.* Boutwell, 2 Sandf. Ch. 319; Dean *v.* De Legardi, 24 Miss. 424; Sparks *v.* State Bank, 7 Blackf. 469; Solms *v.* McCulloch, 5 Barr, 473; Allen *v.* Montgomery, &c. 11 Ala. 437; Copeland *v.* Copeland, 28 Maine, 525; Woodworth *v.* Guzman, 1 Cal. 203; Bell *v.* Thomas, 2 Clarke, (Iowa,) 384.

[3] Bolles *v.* Chauncey, 8 Conn. 389.

[4] Dunham *v.* Dey, 15 Johns. 556.

[5] Pike *v.* Collins, 33 Maine, 38.

[6] Dick *v.* Balch, 8 Pet. 30.

[7] Harris *v.* Norton, 16 Barb. 264

tration is a substitute for *livery of seisin;* and, if the *notoriety* intended to be effected by both of these ceremonies is otherwise attained, registration is unnecessary. Upon this ground, not only is an unrecorded mortgage good against the grantor and his heirs, but also against a second purchaser, mortgagee or attaching or levying creditor, who has actual or presumptive notice of the first mortgage; such party himself being deemed guilty of a fraudulent act. The same rule applies to a purchaser with notice from such grantee. But a second purchaser, &c., with notice, will acquire a good title against the first purchaser, after waiting a reasonable time for the mortgagee to record his deed; because he may fairly presume that in some way the estate has been restored to the grantor. Open, peaceable, and exclusive possession by a grantee is *primâ facie*, but not conclusive, evidence of notice to the subsequent purchaser. In case of a deed and defeasance back, notice, in order to have any effect, must be notice of such facts as constitute the transaction a mortgage.[1] It is said, the notice which will bind a purchaser, &c., must be either positive or implied. It is not sufficient that the party is thereby put upon inquiry, or that there is a mere *suspicion* of notice.[2] And it is sometimes held, that constructive notice of a valid and properly registered mortgage is not conclusive evidence of *mala fides* in a subsequent mortgagee; though it is otherwise with actual notice.[3]

24. An unregistered mortgage is valid in the State where the property is situated, against a purchaser with notice, though executed in another State.[4] But the fact of execution in another State does not dispense with the general necessity of registration.[5]

25. A. conveyed to B., taking a mortgage for the price, which was not recorded within sixty days. B. then con-

[1] 2 Hill. on R. P. 430–432.

[2] Fort *v.* Burch, 6 Barb. 60; Fleming *v.* Burgin, 2 Ired. Ch. 584; Gill *v.* M'Attee, 2 Md. Ch. 255. See Ohio, &c. *v.* Ross, 2 Md. Ch. 25; Day *v.* Clark, 25 Verm. 397; Doyle *v.* Stevens, 4 Mich. 87.

[3] Paine *v.* Mason, 7 Ohio, (N. S.) 198.

[4] Dearing *v.* Watkins, 16 Ala. 20.

[5] Dearing *v.* Lightfoot, Ibid. 28.

veyed to C., taking a mortgage for the price, which he foreclosed by a sale of the premises, being himself the purchaser, through an agent. B. afterwards quitclaimed all his title to D., who had no actual notice of A.'s mortgage. Held, D. took subject to A.'s mortgage.[1]

26. If land is conveyed and immediately mortgaged back for the price, and the mortgagee remains in possession, but neither deed nor mortgage is recorded; such mortgage shall have priority of a subsequent mortgage, duly recorded.[2]

27. Where one who has contracted to sell land gives a mortgage of it, the tenant of the purchaser being at the time in possession; this is constructive notice to the mortgagee of the sale, and he is bound thereby.[3]

28. Pendency of a foreclosure suit, after service, is sufficient notice of the mortgage.[4]

29. If a mortgage, duly recorded, recite that the premises are the same this day conveyed by the mortgagee to the mortgagor, and now reconveyed to secure the purchase-money; this is sufficient notice of the deed to all claiming under the mortgagee.[5]

30. To charge a party with notice of an unrecorded mortgage, the notice need not be of the date or amount, but only of an existing lien of a certain description by a certain party.[6]

31. Where a recorded mortgage is discharged by one not the mortgagee, a subsequent incumbrancer is bound to inquire into his authority, and chargeable with such facts as he might learn by proper inquiry.[7]

32. Conveyance for a certain sum, with an agreement between the parties and a third person that a part of it should be paid down, he furnishing such part to the grantee, and that, as security therefore, he should receive a first mort-

[1] Smith *v.* Mobile, &c. 21 Ala. 125. See § 22.
[2] McKecknie *v.* Hoskins, 10 Shepl. 230.
[3] Bank, &c. *v.* Flagg, 3 Barb. Ch. 316; Braman *v.* Wilkinson, 3 Barb. 151.
[4] Hoole *v.* Attorney-General, 22 Ala. 190.
[5] Center *v.* P. & M. Bank, 22 Ala. 743.
[6] Barr *v.* Kinard, 3 Strobh. 73.
[7] Swarthout *v.* Curtis, 1 Seld. 301.

gage from the grantee, to be recorded prior to the mortgage to the grantor for the balance of the purchase-money; which was accordingly done. The grantor assigned his mortgage, and at the time of assignment a certificate of the county clerk was shown to the assignee, stating that the mortgage assigned was the first and only mortgage on record. Held, the mortgage given to the party who advanced the money should have priority.[1]

33. A first mortgage was not recorded, but a second mortgage of the same property was recorded, the mortgagee having notice of the former incumbrance. The second mortgagee assigned his mortgage to one having no notice of the first, but the assignment was not recorded. The assignee foreclosed, not making the holder of the first mortgage a party. The purchaser at the Master's sale had notice of the first mortgage, and recorded his deed. Held, the first mortgage should have precedence of the title of such purchaser.[2]

34. Bill in equity by the holder of a subsequent mortgage against the holder of a prior mortgage, but subsequently recorded. The bill alleged that the plaintiff had no notice of the defendant's mortgage; and the answer, that the defendant "had always understood and believed" that the plaintiff had notice. Upon a hearing on bill, answer, and replication, a decree was rendered for the plaintiff.[3]

35. If a mortgage is made without consideration, and transferred to a *bonâ fide* purchaser, and the mortgagors then convey to a *bonâ fide* purchaser, without notice of the mortgage, the assignee of the mortgage will hold.[4]

36. In Jones *v.* Smith,[5] it was held that the doctrine of constructive notice applies in two cases: First, where the party has had actual notice that the land is in some way charged or incumbered, and has therefore been held, by an implied knowledge of facts and instruments, to a knowledge

[1] Lovett *v.* Demarest, 1 Halst. Ch. 113.

[2] Fort *v.* Burch, 5 Denio, 187, (Whittlesey, J., dissented.)

[3] Taylor *v.* Thomas, 1 Halst. Ch. 331.

[4] Andrew Newport's case, Cas. Temp. Holt, 477; Skin. 423.

[5] 1 Hare, 43.

of which he would have been led by an inquiry after such charge or incumbrance. Second, where the party has abstained from inquiry, for the very purpose of avoiding notice. In a subsequent case,[1] *gross negligence*, in reference to a knowledge of the prior incumbrance, has been held to be equivalent to fraud.[2]

37. In Fuller *v.* Bennett,[3] after negotiations extending over five years, an estate was purchased, and nearly two years after such purchase mortgaged by the purchaser. The solicitor of the purchaser in making the purchase was solicitor of both parties in making the mortgage, and during the treaty for a purchase he had notice of an incumbrance. Held, such notice charged the mortgagee. But a client is not affected with notice of a fraud which the solicitor himself has practised with respect to the title, unless the client would have had constructive notice of it through the solicitor, if practised by a third person.[4]

38. If the parties employ one attorney, the mortgagee will be charged by notice to him, even though the sale was made under the direction of the Court, and the purchase made by trustees on behalf of an infant.[5] So, if the mortgagor act as the mortgagee's attorney, notice to the former will bind the latter, if given *in re gestâ*.[6]

39. A tenant for life, with a power to charge £20,000 for the portions of younger children, mortgaged his life-estate, and covenanted with some of the mortgagees not to execute the power without their consent. He afterwards exercised the power for the benefit of his children, and created a long term to secure the £20,000; and, upon the marriage of one of his daughters, appointed £5,000 to her for a portion. The trustees and appointees had notice of the mortgage and of the covenant. Held, the mortgage should have priority over the title of the appointees.[7]

[1] West *v.* Reid, 2 Hare, 249.
[2] See Whitbread *v.* Jordan, 1 Y. & Col. (Exch.) 303; Sugd. Vend. 1054; Jones *v.* Smith, 1 Phill. 255; Steedman *v.* Poole, 6 Hare, 193; Taylor *v.* Baker, 5 Price, 306.
[3] 2 Hare, 394.
[4] Kennedy *v.* Green, 3 M. & K. 699.
[5] Toulmin *v.* Steere, 3 Mer. 210.
[6] Dryden *v.* Frost, 3 M. & C. 673.
[7] Hurst *v.* Hurst, 19 Eng. Law & Eq. 374.

40. Two persons, purchasing land, made a mortgage for the price, which was not recorded. Afterwards one of them, by a deed of trust, conveyed an undivided half for the payment of certain debts; under which deed a sale was ordered by the Court of Chancery, and made, and the interest of the grantor purchased by one not having notice of the mortgage. Held, the mortgage might be enforced against the residue of the land, for the amount due, and that the other mortgagor must look to the grantor for reimbursement.[1]

41. A subsequent mortgagee with notice cannot avail himself of any misdescription in the former mortgage, which would be corrected in equity as between the first mortgagee and the mortgagor.[2]

42. If a subsequent mortgagee relies upon want of registration of the first mortgage, he must deny notice, whether charged in the bill of the first mortgagee or not.[3]

43. It is competent to show by the mortgagor, that a subsequent mortgagee had notice of a prior unrecorded mortgage.[4] (*b*)

44. It has been held that a mortgage may be recorded after the mortgagor's death.[5]

44 *a*. If a first mortgagee agrees by a sealed instrument with a second mortgagee, that the second mortgage shall have priority; this will give it such priority, though the registry remain unchanged.[6] A sealed agreement for such

[1] Ohio Life, &c. *v.* Ledyard, 8 Ala. 866.
[2] Woodworth *v.* Guzman, 1 Cal. 203.
[3] De Vendal *v.* Malone, 25 Ala. 272.
[4] Van Wagenen *v.* Hopper, 4 Halst. Ch. 684, 707.
[5] Gill *v.* Pinney, 12 Ohio St. 38.
[6] New York, &c. *v.* Peck. 2 Halst. Ch. 37.

(*b*) The possession of the mortgagor will not ordinarily be regarded as adverse, without some unequivocal act, hostile to the mortgagee's title, and distinctly brought to his knowledge, or unless the possession becomes a disseisin by the election of the mortgagee. In this respect the assignee of the equity of redemption, with notice of the mortgage, stands like the mortgagor, and the registry of the mortgage, being in the line of the assignee's title, is constructive notice to him. Neither the mortgagor nor his assignee, with such constructive notice, can be regarded as holding the land under a supposed legal title, within the meaning of the law relating to betterments. Tripe *v.* Marcy, 39 N. H. 439.

waiver concerns an interest in lands, and therefore may be recorded to all the world.[1]

45. A mortgagee of a defendant in execution, who has failed to record his mortgage until after the land has been sold under the execution, has no lien or intervening rights as against the purchaser; he can redeem under the statute; if he fails to do so, a court of equity will not interpose.[2]

46. The record of a mortgage is sufficient notice, though not mentioned in the alphabet or index.[3]

47. Actual notice of the amount secured by a mortgage is binding upon a subsequent purchaser, though there be a mistake in the registry.[4]

48. But where there is a mistake in the registry of a mortgage, as to the amount secured by the mortgage, the registry is notice only to the extent expressed in the registry.[5]

49. The inscription, in the office of the recorder of mortgages, of any act which gives notice to third persons of a mortgage, fulfils the object of the law; and the notice is equally binding, whether derived from the inscription of the order appointing the tutor or curator, from the certificate of his appointment, or from the bond.[6]

50. The filing of a mortgage by a clerk in the store of the town clerk, in charge of the town clerk's office in the absence of that officer, is sufficient. It is the duty of the town clerk, and not of the mortgagee, to number a mortgage, and the rights of a mortgagee cannot be impaired by the omission.[7]

51. Where a mortgage to the commissioners for loaning the U. S. deposit fund was entered in the book out of the order of its date by several years, it was held to be no notice to a subsequent *bonâ fide* mortgagee.[8]

52. Where a mortgage to secure an acceptor of drafts is duly made and recorded, and subsequently an indorsement, executed and acknowledged, with the formalities of a deed,

[1] Clason *v.* Shepherd, 6 Wis. 369.
[2] Smith *v.* Randall, 6 Cal. 47.
[3] Curtis *v.* Lyman, 24 Verm. 338.
[4] Frost *v.* Beekman, 1 Johns. Ch. 288.
[5] Ibid.
[6] Sauvemet *v.* Landreaux, 1 La. An. 219.
[7] Dodge *v.* Potter, 18 Barb. 193.
[8] New York Life Ins. Co. *v.* White, 17 N. Y. (3 Smith,) 469.

is made on the mortgage, providing that the mortgage, in all its provisions and terms, shall extend to the securing of a further sum; the indorsement may be recorded in another part of the record book than that containing the original mortgage, without recording the original again; and, if the subsequent record intelligibly refer to the first record, the indorsement will be a valid extension of the condition of the mortgage as first made and recorded.[1]

53. The error in the description in a mortgage appearing by construction, its record is notice to subsequent purchasers that the mortgage is upon the lot intended to be designated, and they take subject to it.[2]

54. A registry of a mortgage, affirming that it was "registered at the request of Thomas Bloodgood, (acting executor, &c.)" is bad, as not sufficiently entering the name of the mortgagee.[3]

55. Such entry, made in the year 1817, (in New York) cannot be aided by the entry of the name of the mortgagee in the index of mortgages kept in the clerk's office.[4]

56. A clerk's minute of registry of a mortgage that it was duly proved, without information as to the manner of the proof or acknowledgment, cannot enable a person examining the record to determine upon inspection whether the acknowledgment or proof was in fact sufficient, and therefore does not fulfil the object of the statutory provision.[5]

57. M. took a deed which was noted for registration June 19, 1855. N. took a mortgage of the same land from the same grantor, and it was registered July 7. The former deed was not registered until August 30. By the act of 1841, c. 12, § 2, the notation for registry has the same effect, in giving priority, as registration. Held, that M. was entitled to priority, although it appeared by parol that his deed was only intended as a mortgage to secure certain debts.[6]

[1] Choteau *v.* Thompson, 2 Ohio, (N. S.) 114.

[2] Anderson *v.* Baughman, 7 Mich. 69.

[3] Peck *v.* Mallams, 10 N. Y. 6 Seld. 509.

[4] Ibid.

[5] Ibid.

[6] Ruggles *v.* Williams, 1 Head, (Tenn.) 141.

58. A mortgage first recorded has priority, although the prior mortgagee, whose deed is subsequently recorded, forecloses, and himself purchases the estate, the other mortgagee not being made party to the suit.[1] So the purchaser on the foreclosure of an unregistered mortgage is not such a *bonâ fide* purchaser, as to overreach a conveyance by the mortgagor to a *bonâ fide* purchaser after the mortgage, and before foreclosure, who was in possession at the time of the foreclosure and sale.[2] (*c*) So, a *bonâ fide* purchaser will be protected against a prior unregistered mortgage, though the mortgage is subsequently registered before the registration of the deed to the purchaser.[3]

59. Where a person mortgages lands which he holds under a bond for a deed, he conveys thereby no legal interest in the bond, but only an equitable interest; and the registry of such mortgage is notice to no one.[4] (But see § 4.) So a mortgage without seal or scroll is not constructive notice to subsequent purchasers and creditors, though on record; yet it transfers an equity to the mortgagee, and, being prior to a mere covenant to mortgage, must prevail against such covenant, with or without notice.[5] (*d*)

[1] Taylor *v.* Thomas, 1 Halst. Ch. 331.
[2] Hawley *v.* Bennett, 5 Paige, 104.
[3] Ibid.
[4] Wing *v.* McDowell, Walk. Ch. 175; Farmers', &c. *v.* Maltby, 8 Paige, 361. But see Parkhurst *v.* Alexander, 1 Johns. Ch. 394.
[5] Portwood *v.* Outton, 3 B. Mon. 247.

(*c*) If a judgment has priority over an unrecorded mortgage, the judgment purchaser also has priority, though he buys with full notice of the mortgage. Smith *v.* Jordon, 25 Geo. 687.

Pending a suit for foreclosure, the mortgagee assigned an interest in the mortgage, which assignment was recorded; and, upon a sale of the premises, under the decree of foreclosure, he became the purchaser; whereupon certain judgment creditors levied upon the land, and at the sheriff's sale became the purchasers. Held, in the absence of any allegation to the contrary, such creditors would be presumed to have purchased in good faith, without notice that the assignee had not received his share of the purchase-money, under the foreclosure. Norton *v.* Stone, 8 Paige, 222.

(*d*) The following statutory provisions and judicial decisions may properly be cited, as a sequel to the present chapter. Later statutes may have escaped notice.

In Vermont, where the assignee of a mortgage brings a bill to foreclose, he need not aver that the assignment is recorded. King *v.* Harrington, 2 Aik. 33. See Norton *v.* Stone, 8 Paige, 222.

In New York, the registration of the assignment of a bond and mortgage is not notice to the mortgagor of the assignment. Reed *v.* Marble, 10 Paige, 409; Wolcott *v.* Sullivan, 1 Edw. Ch. 399.

In Pennsylvania, an act of 1715 provided, that any mortgage, or defeasible deed in the nature of a mortgage, should be invalid, unless recorded in six months from its date. By an act of 1820, mortgages take effect in the order of registration, except those given back to secure the price of the land conveyed, for the recording of which sixty days are allowed. A mortgage, though not recorded within six months, has been held valid against the mortgagor and a purchaser with notice. 2 Hill. on R. P. 448.

In Delaware, mortgages lodged for registry at the same time have priority according to their dates; if made for the purchase-money, sixty days are allowed for recording. Ibid. 449. Priority is according to the date of registry. Dela. Rev. Sts. 269. A mortgage for the price, if recorded in sixty days, has precedence of a judgment. Ibid.

In Arkansas, a mortgage gives no lien till filed for record. Ark. L. 745.

In North Carolina, a mortgage is void against creditors or purchasers, unless proved or recorded, like other deeds, within six months. As against such creditors, &c., a title passes only from registry. A mortgagee in an unrecorded mortgage may redeem one which is recorded; but the mortgagor loses his right of redemption. 2 Hill. on R. P. 459. See Skinner *v.* Cox, 4 Dev. 59.

In Ohio, a mortgage takes effect either in law or equity only from the time it is left for record. The statute makes the recording a part of the execution. Doe *v.* Bank, &c. 3 McLean, 140; Holliday *v.* Franklin, &c. 16 Ohio, 533; Brown *v.* Kinkman, 1 Ohio, State R. 116; White *v.* Denman, Ibid. 110; Magee *v.* Beatty, 8 Ham. 396. A prior unrecorded mortgage is postponed to a subsequent recorded one, though the second mortgagee had notice. Stansell *v.* Roberts, 13 Ohio, 148; Mayham *v.* Coombs, 14 Ib. 408.

In Mississippi, mortgages recorded more than three months after execution, take effect from their delivery to the recorder. Missis. Rev. C. 453, 454. Of two deeds delivered to the recorder on the same day, the one first executed has priority. Ibid. The Statute of Mississippi, giving validity to mortgages upon delivery for registry, does not apply to mortgages, executed out of the State, of property out of the State. Prewett *v.* Dobbs, 13 Sm. & M. 431.

In Indiana and Texas, a mortgage shall be recorded in ninety days from its execution; otherwise it is deemed fraudulent and void against a subsequent mortgagee or purchaser, unless recorded before the deed of the latter. 2 Hill. R. P. 460; Hartl. Dig. 834, 835.

In North Carolina, a mortgage, not recorded seasonably, is invalid against purchasers subsequent to the mortgage, whose conveyances are recorded before the mortgage. Cowan *v.* Green, 2 Hawks, 384. So with executions issued prior to registration. Davidson *v.* Beard, 2 Hawks, 520. See Pike *v.* Armstead, 1 Dev. Ch. 110; Fleming *v.* Burgin, 2 Ired. Ch. 584.

Under the proviso of the Pennsylvania statute of March 28, 1820, mortgages given for the price of the lands mortgaged are liens from the time of their execution, if recorded within sixty days therefrom. Bratton, &c. 8 Barr, 164.

In Kentucky, a mortgage is invalid against creditors, unless acknowledged and deposited for record within sixty days from its execution. Stephens *v.* Barnett, 7 Dana, 257. If proved or acknowledged, and recorded within sixty days, a mortgage proves itself. Bibb *v.* Williams, 4 Monr. 579.

As to registration in Michigan, see Beals *v.* Hale, 4 How. U. S. 37. See, also, Thompson *v.* Mack, Harring. Ch. 150.

In South Carolina, a mortgage is good against subsequent judgment creditors, without registration or notice. Coleman *v.* Bank, &c. 2 Strobh. Eq. 285. See Ross *v.* Bank, &c. 3 Strobh. Eq. 245.

As to the law in Alabama, Herbert *v.* Hanrick, 16 Ala. 581; Harbrison *v.* Harrell, 19 Ala. 753; Smith *v.* Mobile, &c. 21 Ala. 125; New Jersey, N. J. L. 1858, p. 90; Indiana, Ind. Sts. 1859, p. 106; New York, N. Y. &c. *v.* Staats, 21 Barb. 570; Maryland, Pannell *v.* Farmers', &c. 7 Har. & J. 202.

In Maryland, where an omission to record a mortgage has occurred, without fraudulent design, the mortgage will be decreed to be recorded, saving the rights of subsequent purchasers and creditors, without notice; and, upon a bill by the mortgagee, a sale of the mortgagor's interest at the time of its execution may be decreed, with a like saving. Sprigg *v.* Lyles, 2 Gill & J. 446. But where the security afforded by an unrecorded mortgage has been abandoned for other security, given by the debtor and accepted by the creditor, the mortgage will not be decreed to be recorded. Ibid.

UC SOUTHERN REGIONAL LIBRARY FACILITY
AA 000 820 405 9